



DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD

Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy

The Harvard community has made this article openly available.
[Please share](#) how this access benefits you. Your story matters.

Citation	Frank I. Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Indiana L.J. 145 (1977).
Published Version	http://www.repository.law.indiana.edu/ilj/vol53/iss2/1/
Accessed	February 16, 2015 5:06:18 PM EST
Citable Link	http://nrs.harvard.edu/urn-3:HUL.InstRepos:12918285
Terms of Use	This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA

(Article begins on next page)

1-1-1977

Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy

Frank I. Michelman
Harvard Law School

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Politics Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Michelman, Frank I. (1978) "Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy," *Indiana Law Journal*: Vol. 53: Iss. 2, Article 1.
Available at: <http://www.repository.law.indiana.edu/ilj/vol53/iss2/1>

This Lecture is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Political Markets and Community Self-Determination:
Competing Judicial Models of Local Government
Legitimacy†

Frank I. Michelman*

Some recent studies have sought to "define and illuminate the basic character of the legal system"¹ by exposing a more-or-less hidden "implicit economic logic"² in the system, suggesting that "the . . . system itself—its doctrines, procedures, and institutions—has been strongly influenced by a concern (more often implicit than explicit) with promoting economic efficiency."³ The studies have concentrated on legal activity of a sort that seemingly would be most resistant to unifying rationalization in strongly goal-orientated terms—that is, to common-law adjudication in the well-trodden ways of private law, where law is supposedly made incrementally and under severe formalistic constraint (if "made" at all and not just "found") and openly instrumentalist reasoning is not usually professed without at least a hint of apology or recrimination. They have made rather impressive progress in an effort to show that the ostensibly divergent and disrelated materials of the common law can be unified, ordered, made mutually coherent, by regarding them as the handiwork of generations of judges motivated by an aim—veiled

†This article is a significantly revised version of the Harris Lectures delivered in April, 1977 at the Indiana University School of Law of Bloomington. It has had the benefit of valuable criticism from several colleagues and friends who kindly read earlier drafts or portions, including Bruce Ackerman, Philip Heymann, Duncan Kennedy, Mitchell Polinsky, Richard Posner, members of the Society for Ethical and Legal Philosophy, and members of the Law and Economics Workshop at the University of California at Los Angeles.

*B.A. 1957 Yale; LL.B 1960. Professor of Law, Harvard.

¹Posner, *The Economic Approach to Law*, 53 Tex. L. Rev. 757, 764 (1975) [hereinafter cited as Posner I].

²*Id.* at 760. See also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 179 (2d ed. 1977) [hereinafter cited as *ECONOMIC ANALYSIS*].

³Posner I, *supra* note 1, at 763-64.

and inarticulate but nonetheless conscious—of making the law *efficient* in a strictly economic sense.⁴ Common law doctrines and decisions are thus viewed as the outward manifestations of an underlying normative order.

As a student of public law—local government law particularly—I am led to wonder whether an identical or parallel regularity can be discovered in the characteristic materials of that field. Of course, the field of local government law cannot offer for investigation anything quite corresponding to the common law—the unwritten, judge-created law—insofar as legal theory insists that all claims of local-government authority must be traceable to specific, formal constitutional or statutory sources.⁵ Yet a great deal of the law to which courts appeal as delineating local-government authority is actually so open, so little constrained or determined by constitutional or statutory texts, so little referable to any discoverable legislative intent—is rather so much and so obviously a product of doctrinal formulations evolved by judges in the course of case-by-case adjudication, from sources and inspirations quite beyond written texts or suppositious historical intentions—that whole masses can fairly be said to compose a floating “general law” of local government hardly less open to spontaneous judicial economizing, or less inviting to the rationalizing ambitions of a theorist, than is the corpus of private-law doctrine.⁶

This general law encompasses not only judicial elaborations of vague constitutional phrases but also judge-made doctrines of implied constitutional limitations and so-called “canons of construction” for statutory material. To give just a few illustrations: The universally recognized judicial doctrines that restrict exercises of regulatory authority to those that promote “the general welfare,” or demand that tax revenues be expended only for a “public purpose,” may be thought implicit in the standard constitutional injunction against depriving persons of property and liberty without due process of law, or in constitutional grants to legislatures to exercise the power to tax, or they may just be direct judicial implications of constitutional intent claiming no

⁴See, e.g., ECONOMIC ANALYSIS, *supra* note 2, pt. II; Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971). There are other contributors and contributions of merit, a good collection of which can be gleaned from ECONOMIC ANALYSIS, *supra* note 2, *passim*. For Professor Posner's view that the efficiency-tending characteristic he finds in the common law is, at least in part, a result of conscious judicial striving towards efficiency, see ECONOMIC ANALYSIS, *supra* note 2, at 181, 405; see also *id.* at 440-41. For a contrasting view see Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 57 (1977); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977). For further discussion see notes 221-227 *infra* & text accompanying.

⁵See, e.g., J. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-55 (5th ed. 1911) [hereinafter cited as J. DILLON].

⁶“[A]n historical view shows due process as an example of the method of the common law, both because it has evolved slowly and because its development has been so thoroughly in the hands of the judiciary.” Miller, *The Forest of Due Process Law: The American Constitutional Tradition*, in NOMOS XVIII: DUE PROCESS at 4 (J. Pennock & J. Chapman eds. 1977).

specific textual base.⁷ Rarely does anything seem to turn on which theory is used. Again, the standard constitutional recitals that something called "the legislative power" is "vested in" the state legislature⁸ may be a partial source of the judicial doctrine that limits the extent to which state legislatures may "delegate" authority to local units of government or to nonpublic agencies.⁹ The due process clauses may also be a source of such doctrine.¹⁰ Likewise, state statutes conferring specified powers or functions on local governments may provide a basis for judicial holdings that restrict the extent to which the designated local governments may, in turn, delegate those powers or functions to other public or nonpublic agencies¹¹—as may, again, the due process clauses.¹² But little seems to turn on identifying textual bases for delegation doctrine. There exists a general body of law on delegation which has a life of its own not significantly determined by constitutional verbiage, which speaks through non-enacted doctrinal formulations and gives rise to non-enacted rules for construing statutes, such as the famous "Dillon Rule" of strict construction of legislative grants of governmental power to local units.¹³

Inasmuch as these "open" areas of public law pertain to disputes about the extent of governmental powers or the procedures for exercising them, it is natural to think that a judge formulating doctrine or deciding cases in these areas would have somewhere in mind a normative model of government, however indistinct, inarticulate, or intuitive the model might be—a normative model being a general conception of how governmental institutions ideally must be supposed to work in order to satisfy the conditions of a theory of moral justification for such institutions. Governmental institutions tend to occupy morally problematic positions—generate a continuing demand for moral justification because our world is one in which ultimate ends are generally taken to be those of individuals and social arrangements, accordingly, tend to

⁷The two ideas—the ultra vires idea that the constitutional grant of authority to levy taxes does not encompass levies whose proceeds are directed to nonpublic purposes, and the individual-rights idea that there is a constitutionally protected personal or individual right not to have one's property appropriated for nonpublic purposes—are commingled in the classic case of *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875). See also *Lowell v. City of Boston*, 111 Mass. 454 (1873); T. COOLEY, 2 CONSTITUTIONAL LIMITATIONS 1026-40 (1927). For the view that constitutional due process guarantees incorporate this personal right, see, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896); *Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799 (1938).

⁸E.g., TENN. CONST. art. 2, § 3 (1956); MASS. CONST. C. 1, § 1, art. IV; *id.* DECLARATION OF RIGHTS art. XXX.

⁹E.g., *Opinion of the Justices*, 328 Mass. 674, 105 N.E.2d 565 (1952).

¹⁰E.g., *Rice v. Foster*, 4 Del. (4 Harr.) 479 (1847) (natural rights) (semble); *Eubank v. Richmond*, 226 U.S. 137 (1921) (due process). See notes 63-103, 110-18, 130-42 *infra* & text accompanying.

¹¹E.g., *Murray v. Egan*, 28 Conn. Supp. 204, 256 A.2d 844 (1969); *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n* 64 N.J. 17, 311 A.2d 737 (1973).

¹²E.g., *Marta v. Sullivan*, 248 A.2d 608 (Del. 1968).

¹³The anti-delegation inspirations for the Rule are apparent in Judge Dillon's classic discussion. See J. Dillon, *supra* note 5.

be judged by their conduciveness to individual welfare, individual self-realization, individual freedom.

Parts II and III of this essay will try to show that the "public purpose" and "delegation" doctrines, as judicially fashioned and applied, suggest the coexistence in the judicial mentality of two different, and contradictory, models of local-government legitimacy (described in Part I)—an economic or "public choice" model and a non-economic "public interest" or "community self-determination" model.¹⁴ Part IV will compare the descriptive power of these models in relation to a topic of current legal concern, local zoning. Part V will try briefly to suggest what an irresolute duality of models might mean for the intellectual situation of local-government law generally. Finally, Part VI will trace some relationships between these apparent judicial conceptions of local-government legitimacy and the theory that common-law adjudication has historically been shaped by judicial striving to make the law economically efficient.

I. TWO MODELS OF LEGITIMACY

In the economic or public choice model, all substantive values or ends are regarded as strictly private and subjective. The legislature is conceived as a market-like arena in which votes instead of money are the medium of exchange. The rule of majority rule arises strictly in the guise of a technical device for prudently controlling the transaction costs of individualistic exchanges.¹⁵ Legislative intercourse is not public-spirited but self-interested. Legislators do not deliberate towards goals, they dicker towards terms. There is no right answer, there are only struck bargains.¹⁶ There is no public or general or social interest, there are only concatenations of particular interests or private preferences. There is no reason, only strategy;¹⁷ no persuasion, only temptation and threat. There are no good legislators, only shrewd ones; no statesmen, only messengers;¹⁸ no entrusted representatives, only tethered agents.¹⁹

¹⁴Compare the "two irreconcilable and mutually incomprehensible paradigms in political thought" described and discussed in Salkever, *Freedom, Participation and Happiness*, 5 POL. THEORY 391 (1977).

In speaking of a "judicial mentality" I mean to suggest the existence of a characteristic judicial consciousness, not a collective one. Insofar as judicial habits of thought are conditioned by more general ideological environments, my thesis is that the "second revolution in American political thought" described by Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. LAW & ECON. 467, 486-87 (1976), has never fully displaced the first. See *id.* at 481-83.

¹⁵See generally J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962).

¹⁶See, e.g., G. STIGLER, *THE CITIZEN AND THE STATE* 114-41 (1975).

¹⁷See, e.g., W. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962).

¹⁸On "messengers" see W. BAGEHOT, *THE ENGLISH CONSTITUTION* 193 (2d ed. 1872).

¹⁹Compare the views of Edmund Burke, as lucidly reviewed in H. PITKIN, *THE CONCEPT OF REPRESENTATION* 168-89, esp. at 176 (1967) [hereinafter cited as H. Pitkin].

The opposed, public-interest model depends at bottom on a belief in the reality—or at least the possibility—of public or objective values and ends for human action.²⁰ In this public-interest model the legislature is regarded as a forum for identifying or defining, and acting towards those ends. The process is one of mutual search through joint deliberation, relying on the use of reason supposed to have persuasive force. Majority rule is experienced as the natural way of taking action as and for a group²¹—or as a device for filtering the reasonable from the unreasonable, the persuasive from the unpersuasive, the right from the wrong and the good from the bad.²² Moral insight, sociological understanding, and goodwill are all legislative virtues.²³ Representatives are chosen in part for their supposed excellence in such virtues.²⁴ This model, no doubt, is as sentimental as the public-choice model is

²⁰Compare the "idealist position" described and criticized in K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 81-86 (2d ed. 1963) (discussing views of Kant, Rousseau, T.H. Green, Frank Knight, and others) [hereinafter cited as Arrow]. See also A. LEVINE, *THE POLITICS OF AUTONOMY: A KANTIAN READING OF ROUSSEAU'S SOCIAL CONTRACT* 56 (1976) [hereinafter cited as Levine].

²¹*Id.* at 61.

²²See *id.* at 64-66; Kuflik, *Majority Rule Procedure*, in *NOMOS XCIII: DUE PROCESS* 296, 305-09 (J. Pennock & J. Chapman, eds. 1977) [hereinafter cited as Kuflik]. In the "idealist" view, "the case for democracy rests on the argument that free discussion and expression of opinion are the most suitable techniques of arriving at the moral imperative implicitly common to all. Voting, from this point of view, is not a device whereby each individual expresses his personal interests, but rather where each individual gives his opinion of the general will. This model has much in common with the statistical problem of pooling the opinions of a group of experts to arrive at a best judgment; here individuals are considered experts at detecting the moral imperative." K. Arrow, *supra* note 20, at 85. J. RAWLS, *A THEORY OF JUSTICE* 354-59 (1971), appears to combine the "pooling of views" (idealist, objectivist) notion with a version of the "trading-off" (economic, subjectivist) notion in reaching a justification of majority rule. He calls attention to the likelihood that pooling of views through discussion will improve decisions (regarding what is just and, secondarily, expedient). *Id.* at 357-59:

Yet even with the best of intentions, . . . opinions of justice are bound to clash. In choosing a constitution, then, and in adopting some form of majority rule, the parties accept the risks of suffering the defects of one another's knowledge and sense of justice in order to gain the advantages of an effective legislative procedure. There is no other way to manage a democratic regime. Nevertheless, when they adopt the majority principle the parties agree to put up with unjust laws only on certain conditions. Roughly speaking, in the long-run the burden of injustice should be more or less evenly distributed over different groups in society, and the hardships of unjust policies should not weigh too heavily in any particular case.

Although Rawls' meaning is not crystal clear, the "certain conditions" limiting the parties' tolerance for unjust laws seem to include (chiefly) the majority-rule system itself which supposedly will tend to moderate concentration of injustice on any particular group. It may be, however, that the "certain conditions" Rawls has in mind are substantive constraints like bills of rights and minimum guarantees derived from the "two principles of justice." But that reading seems the less plausible because those constraints would tend to moderate the distribution of *burdens* or *costs*, not the distribution of "injustice."

²³See, e.g., H. Pitkin, *supra* note 19, at 169 (describing Burke's views).

²⁴The precept of apportionment of district representatives by population—of "one person, one vote" within the framework of a geographically districted representation scheme (e.g., *Reynolds v. Sims*, 377 U.S. 533 (1963))—seems easier to reconcile with the "public interest" view of the purpose of elections (choosing the best-qualified officials) than with the "public choice" view (making particular interests influential in proportion to their "weights" in the population).

unlovely; but though public interest may in that sense be a less "realistic" way of looking at the world than public choice, I doubt that it is less real as a description of our actual way of experiencing and interpreting our political life; nor is it less real—and here is a major thesis of this essay—as a description of the way judges perceive that life.

Coexistence of the two opposed models of legitimacy may be connected with a deep controversy in our philosophical tradition between opposed notions of human freedom and value. On the one hand there is a tradition deeply entrenched in Western thought—chiefly associated with Kant²⁵ and Rousseau²⁶ but apparently tracing back at least to Aristotle²⁷—that conceives individual freedom in such a way that its attainment depends on the possibility of values that are communal and objective—jointly recognized by members of a group and determinable through reasoned interchange among them. In the conception advanced by Rousseau and Kant, freedom is the state of giving the law to oneself.²⁸ This conception is, to put it a bit crudely, one of self-regulation as opposed to self-indulgence. It implies that unfettered trade in a perfectly free, competitive market cannot by itself constitute a person's

See generally Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 21-61. See also J.-J. ROUSSEAU, *The Social Contract or Principles of Political Right*, in *THE SOCIAL CONTRACT AND DISCOURSES* (Everyman's ed. 1950), at 68 ("By this means [election] uprightness, understanding, experience, and all other claims to pre-eminence and public esteem become so many further guarantees of wise government") [hereinafter cited as J.J. Rousseau].

²⁵See note 28 *infra*.

²⁶See *id.*

²⁷Compare ARISTOTLE, *POLITICS* (J. Warrington tr.) in *ARISTOTLE'S POLITICS AND THE ATHENIAN CONSTITUTION* 156 (Everyman's ed. 1959): "In extreme democracies . . . everyone lives as he pleases, as Euripides says, 'for any end he happens to desire.' But this is an altogether unsatisfactory conception of liberty. It is quite wrong to imagine that life subject to constitutional control is mere slavery; it is in fact salvation." See E. BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 355 (Dover ed. 1959). Durkheim is another notable contributor to this associational conception of freedom. See E. DURKHEIM, *SUICIDE* 169-70, 210-15, 248-49, 289-90, 356 (J. Spaulding & G. Simpson tr., 1951); R. WOLFF, *THE POVERTY OF LIBERALISM* 143-45 (1968).

²⁸J.J. ROUSSEAU, *supra* note 24, at 9 ("to remove all liberty from [man's] will is to remove all morality from his acts"); *id.* at 19 ("what man acquires in the civil state, moral liberty, . . . alone makes him truly master of himself; for the mere impulse of appetite is slavery, while obedience to a law which we prescribe to ourselves is liberty"); *id.* at 91: (the essence of the body politic lies in the reconciliation of obedience and liberty"); J.-J. ROUSSEAU, *EMILE* 243 (Everyman ed. 1911): "I am a slave in my vices, a free man in my remorse"; I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (Paton tr., paper ed. 1964), at 108 ("If the will seeks the law that is to determine it anywhere else than in the fitness of its maxims for its own making of universal law—if therefore in going beyond itself it seeks this law in the character of any of its objects—the result is always *heteronomy*. In that case the will does not give itself the law, but the object does so by virtue of its relation to the will"); *Id.* at 114 ("Will is a kind of causality belonging to living things so far as they are rational. Freedom would then be the property this causality has of being able to work independently of *determination* by alien causes What else then can freedom of the will be but autonomy—that is, the property which will has of being a law to itself?")

For the relevant connections between Kant's thought and Rousseau's, see A. Levine, *supra* note 20; E. CASSIRER, *ROUSSEAU, KANT, GOETHE* 23, 31-32, 57 & *passim* (J. Gutmann tr. 1945). See also E. CASSIRER, *THE QUESTION OF JEAN JACQUES ROUSSEAU* 63, 96-97, 107-15 (P. Gay tr. 1954) [hereinafter cited as Cassirer].

freedom; for by itself free trade can be taken as a reflection of perfect enslavement to wants or appetites that are not chosen but just impinge on one inexplicably and uncontrollably. Freedom in the Kantian view must mean *choosing* one's ends by an activity of reason. To think that something called reason can liberate from the bondage of appetite is not to think that such liberation is achieved merely by subordinating the immediate urgings of impulsive desire to the calculated scheming of a longer-range plan. Reason in such a long-range planning guise would still be merely technical, would still function in the service of the reasoner in his ultimately unfree aspect of a carrier of unchosen wants. If reason can liberate from appetite, it can do so only insofar as the reasoner can somehow rise above the question of what long-range plan will best satisfy the present wants of the person as he is in the world as it is, to deal rather with a question about how one is to become or remain the person he wants to be, in the world he needs to live in if he is to be that person.²⁹ Reasoning in such a constitutive mode seems to involve constraint of choice by some principle or set of principles other than the principle of maximizing the satisfaction—even the long-range satisfaction—of one's present wants.

There may be grounds for thinking that, for many if not all individuals, the possibility of such a reasoned choice of ends will depend on the individual's functioning—by participation and commitment—as a member of a group of persons engaged in making choices by which all members are bound.³⁰ If so, then it is the case not only that freedom for individuals

²⁹Compare M. HORKHEIMER, *ECLIPSE OF REASON* 46 (paper ed. 1974) (Platonic concept of Ideas represents "the sphere of aloofness, independence, and in a certain sense even freedom, an objectivity that [does] not submit to 'our' interests"). See also Knight, *Ethics and the Economic Interpretation*, in *THE ETHICS OF COMPETITION AND OTHER ESSAYS* 21, 22-23; *id.* at 26 (rather than "act in order to live," men "live in order to act, they care to preserve their lives in the biological sense in order to achieve the *kind* of life they consider worthwhile"); Knight, *The Ethic of Competition*, in *id.* 41, at nn.41-42; *id.* at 69 ("The sort of person one is depends on the sort of philosophy one chooses").

³⁰It seems that special conditions are required in order that self-submission to chosen ends may liberate from one enslavement (to random appetite) without simply substituting another (to "chosen" ends or principles); and these special conditions may be most readily comprehensible as attributes of collective choice within groups.

If the chosen principles are not to be themselves enslaving they must be open to change. But if they are changeable at will (so as not to be enslaving), then how are they not just a kind of glorified appetite, themselves not chosen but just randomly and inexplicably given to one? (Compare Knight, *Ethics and the Economic Interpretation*, *supra* note 29, at 21, questioning whether "life is a matter of economics.") What we seem to need for freedom are principles that are open to a special kind of change—that is, change that is itself constrained by the principles. In other words, principles that govern morally free choice must be such as are capable of *evolutionary* change—change susceptible of reasoned criticism in terms of the very principles that are themselves undergoing transformation. But what sort of principles might there be that could satisfy all these conditions of constraint, openness, and continuity? There must be, at least, a set of abstract principle to which members of a group commit themselves for the settlement of questions of joint concern—something like what John Rawls calls principles "of justice." (See, J. RAWLS, *A THEORY OF JUSTICE* 3-6 (1971).) The openness of the principles would reside in their abstractness, allowing a part of their meaning always to be held in abeyance, to be worked out through the various, distinctive understandings of the several individual group members as ap-

depends upon the possibility of objective ends or values to which one can commit oneself on principle; but also that for individuals in secular society such ends or values will encompass matters of interpersonal relationship, obligation, and respect and, for the freedom-seeking socialized individual, political process will be both a medium for reasoning towards the ends (and acting towards their attainment) and, at the same time, itself one of the ends. And so the Kantian notion of freedom seems to be a link that connects a public-interest model of politics with an objective stance towards values.

On the other hand there is a strictly individualist and subjectivist conception of human experience, a conception which serves as a foundation for modern economic analysis.³¹ From this subjectivist conception can be derived a strictly behavioristic interpretation of the notion of value, which interpretation may in turn lead to insistence that economic efficiency is the only social good there is—or at least the only one that is amenable to neutral scientific discussion. The general idea is that values, so-called, are taken to be nothing but individually held, arbitrary and inexplicable preferences (the subjectivist element) having no objective significance apart from what individuals are actually found choosing to do under the conditions that confront them (the behaviorist element); from which it seems to follow that there can be no objective good apart from allowing for the maximum feasible satisfaction of private preference as revealed through actual choice—or, in other words,

plication to specific cases is required. Their constraining force would reside in the commitment to resolve specific cases consistently with them. And their continuity would reside in the institutionalized processes through which their application was specified and their meaning concretized, processes which themselves would undergo evolutionary change constrained by the principles which govern them. (The argument in this footnote owes much—perhaps all—to Tribe, *How Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1338-40 (1974), and R. WOLFF, *THE POVERTY OF LIBERALISM* 191-93 (1968), concluding: "Kings achieve freedom only when they converse with other kings. In that sense a free society is a society of kings, and Kant was right to call his ideal moral community a kingdom of ends." It also elaborates on a prior attempt of mine, Michelman, *Comments on Riker on National Planning* (unpublished paper delivered at Liberty Fund Conference on National Planning, Dec. 1975, at 22-24. A closely related conception of freedom—as consisting in participation in the ordering of public affairs—is luminously portrayed on page after page of H. ARENDT, *ON REVOLUTION* (paper ed. 1965) [hereinafter cited as ARENDT.]. Dr. Arendt's stunningly expressed commendations of freedom as "public happiness" (e.g., *id.* at 124), rest heavily on foundations other than the Kantian perception of the relation of freedom and principle; but her argument includes the latter, as also it insists on the opposition of freedom to "prosperity" (*id.* at 133), to "desire" (*id.* at 136), and to "private happiness" (*id.* at 273).)

³¹But note that analytical use of the conception need not imply a belief that it is a true or complete one. See *ECONOMIC ANALYSIS* at notes 45-46 *infra* & text accompanying.

The truly distinguishing mark of the neoclassical economic vision of human experience and fulfillment is not its individualism but its subjectivism. That experience accrues to individuals and not groups, that fulfilling experience depends on (if it isn't identical with) the individual's and not the group's freedom, are assertions few moderns would contest; but individual freedom is one thing, and strict subjectivity—unfathomable privacy and arbitrariness—of all values is another and quite different sort of thing. "X is free" says something about the relations among X's motives, X's action and X's will or consciousness. "X's values (or ends) are strictly subjective" says something about the relations of X's motives to the motives of others. It is controversial whether the state of freedom for individuals is attainable or maintainable in society without societal acceptance of and respect for the supposed fact of strict value-subjectivity.

through "willingness to pay." The resulting allocation of resources to their highest-paying employments is the state known to economists as efficiency.³²

Much like the link between the public-interest model and an objective stance toward values, there seems to be a linkage between the economic (public-choice) model and a subjective stance towards values, provided by what we might call a Hobbesian or Lockean notion of freedom.³³ To see how this works, let us provisionally assume universal recognition of a set of "natural" or pre-political individual rights—rights on the order of those to dispose over and do something with one's body, mind, and capacities, and also over and with those things of which one becomes the "owner" without violating another's ownership—entitlements which translate into claims not to be assaulted, enslaved, trespassed upon, robbed, defrauded. The exact content of such a basic set of individual natural rights, its derivation and defense, are much-vexed questions not yet definitively answered in any of the individualist literature from John Locke³⁴ through James Buchanan³⁵ and Robert Nozick.³⁶ Also unanswered is the question whether any such pre-political rights are necessary logical foundations for an economic theory of the state.³⁷ For the moment these problems can be assumed away, and universal recognition (or deduction) of a set of basic rights—constitutive of what might be called the "ethical individual"—can be supposed. The normative economic theory of governmental institutions can then be seen as proceeding at two levels. At the first level is what has been variously called the "protective,"³⁸ or the "minimal,"³⁹ or the "night-watchman"⁴⁰ state: Every in-

³²See, e.g., *id.* at notes 33-44 *infra* & text accompanying.

³³See J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 4-7 (§§ 4-8); 16-17 (§§26-27); 70-73 (§§123-31) (T. Peardon ed. 1952); T. HOBBS, *LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH* ch. 5, at 43 (Collier Books ed. 1962): "[I]f a man should talk to me of a *free will*; or any *free*, but free from being hindered by opposition, I should not say he were in an error, but that his words were without meaning, that is to say, absurd;" *id.* ch. 14, at 103: "By LIBERTY, is understood, according to the proper signification of the word, the absence of external impediments: which impediments, may oft take away part of a man's power to do what he would; but cannot hinder him from using the power left him, according to his judgment, and reason shall dicte to him;" T. HOBBS, *The Citizen: Philosophical Rudiments Concerning Government and Society*, in T. HOBBS, *MAN AND CITIZEN* 228 (Anchor Books ed. 1972): "If they suppose liberty to consist in this, that there be few laws, few prohibitions, and those too such, that except they were forbidden, there could be no peace; then I deny that there is more liberty in *democracy* than *monarchy* . . . For although the word *liberty* may in large and ample letters be written over the gates of any city whatsoever, yet it is not meant the *subject's* but the *city's* liberty"

³⁴J. LOCKE, *SECOND TREATISE OF GOVERNMENT* (T. Peardon ed. 1952) [hereinafter cited as LOCKE].

³⁵J. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975) [hereinafter cited as BUCHANAN].

³⁶R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1971) [hereinafter cited as NOZICK].

³⁷See, e.g., BUCHANAN, *supra* note 35, at 9-11, 21-23. R. NOZICK, *supra* note 35, at 26-28, 33-35, 48-53, 57-59, 151-53. Locke's name, of course, is at or near the head of every list of liberal theorists of prepolitical individual ("natural") rights. See, e.g., J. LOCKE, *supra* note 34, at 70-73 (c. IX).

³⁸BUCHANAN, *supra* note 35, at 68.

³⁹NOZICK, *supra* note 36, at 26-27.

⁴⁰See *id.* at 25, 26.

dividual's basic entitlements will just obviously be worth more to the several individuals (assuming, always, latent consensus on what everyone's basic entitlements *are*) if enforcement is guaranteed by an impartial institutional enforcer rather than left to self-help. But the protective state as thus explained will be limited to articulating and enforcing obvious rules against assault, trespass, fraud, theft, promise-breaking, and the like; and yet it is very plain that *our* state (including our local governments) has gone far beyond that role, and functions also at the second level, which Buchanan calls the "productive state"⁴¹ and others have called the "welfare state"—producing not only goods and services of a material kind but also regulatory programs (such as zoning or environmental control) which cannot plausibly be palmed off as mere realizations of the basic personal and proprietary entitlements of the ethical individual.⁴²

Yet it is possible to give an individualistic-economic rationale for the welfare state, too. In fact, at least two such accounts are available—what I shall call the "big-bribe" and the "market-failure" accounts. The "big-bribe" account will to many seem the less plausible, though perhaps only because it is the less intricate. Its individualistic explanation of the welfare state is directly parasitic on the simple theory of the protective or night-watchman state.⁴³ Suppose we say the problem is to justify continued acceptance by the relatively well-endowed—those who would be the best-off if everyone were left unmolested in an ungoverned state of nature—of governmental authority to tax and regulate for welfarish, redistributive or productive purposes. Then the answer is that such acceptance is a price (or call it a bribe) those better-endowed should find worth paying, in exchange for peaceful acceptance by the naturally worse-endowed of the government's protective police authority. To the naturally well-endowed, the expected net cost of governmental welfare activities is supposed to be less than that of the combined expected costs of self-defense and losses to predatory neighbors in a state of nature; while to the naturally worse-endowed the expected value of the welfare activities is supposed to be greater than what they could get by unrestricted predation. Thus, welfare-state activities are viewed as a continuing incentive to abide by and support the state's night-watchman function; and unswerving loyalty to the constitutional framework that authorizes and generates both protective and welfarish programs is venerated because nothing else stands between us and deadly Civil Warre.⁴⁴

⁴¹BUCHANAN, *supra* note 35, at 68.

⁴²See, e.g., Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* 390-403, 86 YALE L.J. 385 (1977); B. SIEGAN, *LAND USE WITHOUT ZONING* (1972).

⁴³What follows is a crude summary of a careful and complex argument in BUCHANAN, *supra* note 35, at 53-73.

⁴⁴This is the view apparently taken in Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 26-31. But cf. ECONOMIC ANALYSIS, *supra* note 2, at 343 (last paragraph of § 24.3) (Constitution is designed to protect particular interests of powerful groups, not those of the powerless). It is of a piece with the one taken in T. HOBBS, *LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH*

The market-failure account, though rather more laborious than the big-bribe account, may have more influence in contemporary interpretations of our prevailing governmental institutions. The idea is to view government as one of two great sub-systems—the private market is the other—which together are supposed to achieve an individualistically optimal allocation of resources.⁴⁵ Individuals come to market, so to speak, each with her or his own current endowment of preferences, abilities, and property claims. Of course the juxtapositions of these initial individual situations are always such that exchange transactions among two or more individuals would be advantageous for both or all of them, each judging according to his or her own preferences. Each such case of potential gains from trade involves an “externality”—a situation in which some of the costs or some of the benefits of a person’s actions (or inactions) accrue to other persons. Under behavioristic individualism, efficient resource allocation has for certain occurred only when all costs are borne, and all benefits enjoyed, by those who choose to produce them or have them produced. The virtue of a free market is the tendency it generates toward this state where externalities are all “internalized” by voluntary exchange transactions. Yet markets can sometimes fail to realize the optimum condition of complete internalization. Such failure is associated with unusual difficulty (high transaction costs) in striking a bargain or in organizing all who would have to agree to participate in a transaction in order that its potential, mutual benefits may be reaped. Such difficulty can result when the number of persons who stand to benefit from a costly undertaking is large, and none of these potential beneficiaries can produce the benefit for themselves without also making it available to others (whom it will not be possible to exclude, at any cost or at feasible cost). Decisions about whether to produce such benefits cannot be made efficiently through individual bargaining and exchange unless a way can be found to induce each potential beneficiary to make a lump-sum offer prior to production in exchange for the privilege of free enjoyment once the good is produced. (The good might be a capital facility like a bridge, or it might be provision for a specified period of some public service such as street-cleaning or even of a regulatory program such as zoning.) If that sort of before-the-fact bargaining were possible, then the decision whether to produce would—efficiently—depend on whether the

(Oakeshott ed. 1962; Collier Books). Compare Kennedy, *Legal Formality*, 2 J. LEGAL STUDIES 351, 66 (1973). For the argument connecting this rationale for welfare-state activities with a majority-rule system (as well as some criticism of the argument), see Kuflik, *supra* note 22, at 298-301.

⁴⁵For literature in this “public choice” vein see, e.g., A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1959); J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962) [hereinafter cited as BUCHANAN & TULLOCK]; W. BAUMOL, WELFARE ECONOMICS AND THE THEORY OF THE STATE (2d ed. 1965); E. HAEFLE, REPRESENTATIVE GOVERNMENT AND ENVIRONMENTAL MANAGEMENT (1973); A. BRETON, THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT (1974); R. BISH, THE PUBLIC ECONOMY OF METROPOLITAN AREAS (1971) [hereinafter cited as BISH]; Buchanan, *Politics, Property, and the Law: An Alternative Interpretation of Miller et al. v. Schoene*, 15 J.L. & ECON. 439 (1972).

total of the amounts offered equalled or exceeded the expected costs, including capital costs, of production.

But the transaction costs of such bargaining will tend strongly to be prohibitively high. Where large numbers of persons are involved, getting them organized will itself be a costly operation. The difficulties are aggravated by the likelihood of strategic concealment by free-loaders and hold-outs. Each person, hoping or expecting that others will choose to pay for a good which once produced will necessarily be available to the entire neighborhood or community, will have some motivation to understate his true demand for the good; and each will realize that all the others are subject to the same temptation. For such reasons a largish group of neighbors might well fail to provide themselves with something like a jointly financed police patrol—and fail even to make the attempt—even though, were the truth known, a bargain could be struck which each would regard as privately advantageous.

Taught to appreciate this sort of problem, members of a residential community might unanimously agree to organize themselves into a political unit within which decisions about investment in public goods and programs would thenceforth be made collectively, typically by majority rule and very likely by elected representatives. The key is the majority-rule rule, which will drastically reduce the transaction costs below those required for obtaining unanimous agreement to a joint undertaking.⁴⁶ The charter of government would spell out the decision rules and procedures, would include rules for distributing costs through taxes, and also would place some limits on the range of public goods for which members were liable to be taxed and regulated. (Such goods would undoubtedly include preferred environmental states, to be achieved by regulation, as well as physical facilities and services to be achieved by purchase of labor and materials.) Each member would realize that virtually every public decision would depart in some measure from his or her true individual preferences, and that on occasion such departures might be quite seriously harmful to him or her. Public choice theorists have called such departures "political externalities," in recognition that they are costs that some persons are enabled to impose on others by majority rule.⁴⁷ Yet each member, by subscribing to the arrangement, would signify an expectation that his or her political-externality costs will over the long run be more than offset by gains derived from the coordination that only a political, essentially majoritarian mechanism can achieve at feasible transaction costs. Public choice literature explores in detail—sometimes exquisite—the conditions (including such varied matters as limits on substantive competency, procedural and decision rules, representation arrangements, political-party organization, and boundary-fixing criteria) under which political decisions might be expected to approach

⁴⁶For thorough exploration, see BUCHANAN & TULLOCK, *supra* note 45.

⁴⁷*E.g.*, BISH, *supra* note 45, at 37-42.

long-run maximization, for each individual, of the excess of coordination savings over political costs.⁴⁸

⁴⁸Some of the literature argues strongly *against* the plausibility of thinking that even a deftly designed majoritarian process can churn out hunks of legislated settlements which are individually optimizing or waste-minimizing (*i.e.*, approximate the settlements which would have arisen in a market unburdened by insuperable transactions costs). At the heart of this economically skeptical view of politics is a game-theoretic demonstration that even the most acutely rational, self-interested agents in a multi-lateral, multi-focal political arena must—no less than similarly rational agents in the private market—sometimes be blocked by strategic factors from finding optimal trading partners and optimal deals. The political analogues to “free-riding” and holding out” (*see* text accompanying notes 43-44 *supra*) include such behaviors as strategic agenda manipulation, *see, e.g.*, Kramer, *Some Procedural Aspects of Majority Rule*, in NOMOS XVIII: DUE PROCESS: 264 (J. Pennock & J. Chapman, eds. 1977); Levine & Plott, *Agenda Influence and Implications*, 63 VA. L. REV. 561 (1977); and insincere voting, *see, e.g.*, A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 192-94 (1970); R. BLACK, THEORY OF COMMITTEES AND ELECTIONS 44-45 (1958). *See generally* W. RIKER & P. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973).

We thus acquire an economic theory of “political failure” just parallel to that of market failure (for which *see* text accompanying notes 42-45 *supra*). Compare ECONOMIC ANALYSIS, *supra* note 2, at 271 (“government failure”). But recognition of such failure is not inconsistent with the persistence or appeal of an economic rationale for extant governmental institutions (or of a kindred political ideology, *see, e.g.*, Vincent Ostrom’s economic interpretation of Madisonian republicanism in THE POLITICAL THEORY OF THE COMPOUND REPUBLIC (1948)), which views the combination of market and governmental sectors as aimed at minimizing the economy’s total of deadweight and transactions losses.

Now of course the economically inspired literature on “political failure,” as I have termed it, may give grounds for skepticism about the real-world likelihood that partial substitutions of political for market frameworks, in the forms and degrees characteristic of the modern welfare state, will actually work out efficiently. That literature does not, however, reveal any *logical* gap or inconsistency in the (no doubt optimistic) stories that can be told about how aptly designed governmental institutions *might* improve the economy’s over-all efficiency. The skeptical political-failure literature must be sharply distinguished from another branch of economic analysis of collective-choice schemes, typified by the distinguished contributions of Kenneth Arrow (SOCIAL CHOICE AND INDIVIDUAL VALUES 2d ed. 1963)) and A.K. Sen (COLLECTIVE CHOICE AND SOCIAL WELFARE (1970)), which *does* demonstrate certain *logical* “impossibilities” regarding the co-existence in collective-choice schemes of various combinations of appealing, formal properties. Although occasionally (and carelessly) mischaracterized as demonstrating the futility of collective choice from an economic (efficiency) standpoint, the Arrow/Sen literature neither pretends to nor results in any such demonstration.

As Sen puts it (COLLECTIVE CHOICE AND SOCIAL WELFARE, at 26), Arrow “is concerned with rules of collective choice which make the preference ordering of a society a function of individual preference orderings, so that if the latter set is specified, the former must be fully determined.” Roughly translated and expanded, what this means is that Arrow wants to know whether there are collective-choice procedures (or formulas) which (i) take as their only inputs the several orderings, of possible social states, respectively preferred by the several individual members of society (where individual preference-orderings satisfy certain formal conditions of rationality and internal consistency), and (ii) somehow combine those so as to produce a determinate and consistent social preference ordering of the possible social states such that, as between any pair of alternative social states, either one is socially preferred to the other or society prefers both equally (but more or less than some other possibility). What Arrow, Sen, and their colleagues show is the logical impossibility of there being some such procedure or formula for combining individual preference orderings so as to get determinate and consistent social preference orderings, which procedure also has (some or all of) various appealing, formal properties, such as: equal responsiveness to the preference orderings (or changes therein) of each individual; avoidance of both dictatorship (determination by the preference orderings of a single individual) and imposition (determination by some rule or criterion extraneous to everyone’s preference orderings); consistency with the criterion of Pareto-superiority (any alternative (in a pair) preferred by some in-

II. PUBLIC CHOICE THINKING IN PUBLIC LAW ADJUDICATION

Whether either the big-bribe or the market-failure version of the normative economic (public-choice) account of government can ultimately succeed in reconciling familiar majoritarian institutions with strictly economic (subjectivist and individualist) premises is a question that deserves attention⁴⁹ but is not crucial to our present purpose, which is to see how either version, if

dividuals and dispreferred by none is socially preferred); positive association with individual preferences (when someone upgrades a given alternative on his list and one one downgrades it, society doesn't downgrade it).

The various "possibility theorems" that can be extracted from this problem are, in various ways and various degrees, ethically unsettling. But they do not seem to show (or be intended to show) that astute use of collective-choice schemes, such as majority voting, cannot in fact improve efficiency by reducing misallocations and/or transaction costs. One intuitive, though crude and inexact, statement of a reason why the theorems do not show any such thing is that they construe voting as a static kind of "counting" mechanism for registering individual preferences and combining them into a social preference, not (as it is construed from the "public choice" standpoint), as a dynamic kind of market-continuation process in which (through log-rolling) prices accrue in the form of vote-trades across measures rather than in the form of money or other commodities. A better statement may be that Arrow and Sen search for ways for registering the *ethical* (e.g., distributional), as well as the strictly private, preferences of individuals in or through the "social welfare function," a complication that an individualistic conception of efficiency (and its associated rationales for both market and collective choice schemes) disregards.

Elaboration of these points would carry us well beyond the scope of this essay, but readers wishing to pursue them might begin by consulting Arrow at 7, 59 ("the market mechanism," too, fails to "create a rational social choice"); *id.* at 109-09; Sen at 26, 81, 161-62, 194 ("under some circumstances game considerations and vote trading may help to bring in some measures of intensities of individual preferences, and a vote-trading equilibrium does reflect a compromise of conflicting interests"). See also BUCHANAN & TULLOCK, *supra* note 45, at 332, 359 n. 14; K. ARROW, *THE LIMITS OF ORGANIZATION* (1974), at 33 ("organizations," explicitly including governments, "are a means of achieving the benefits of collective action where the price system fails"), 53 ("the functional role of organizations is to take advantage of the superior productivity of joint actions"), 69 ("... authority, the centralization of decision-making, serves to economize on the transmission and handling of information").

⁴⁹One obvious problem is that the imaginable unanimous agreement (to submit to a majoritarian regime of limited competency) remains utterly hypothetical. It isn't just that some are thrust without choice (that is, born) into subservience to a national and a state constitution and a local government charter. New local-government charters continue to be created and imposed on non-consenting adults by non-unanimous procedures. And in these cases, individualistic postulates cannot be satisfied by any argument that these very [same] political institutions would necessarily emerge if each member of the group would only act in accordance with rational self-interest; that argument can expalin the use of non-unanimous charter-making procedures only by admitting that some real persons in fact refuse to act in the way prescribed as rational, and ethical individualism (I think) demands a full measure of respect even for those persons and their preferences. Nor are the postulates satisfied by the claim that given enough time and effort we could in fact persuade each and every member of the group to support imposition of the governmental institutions, and use of coercive charter-making procedures is therefore justified as a means of saving this time and effort; ethical individualism will not (I think) countenance coercion based on your assumption that those who disagree with you will after full discussion come 'round to your view (for how can you know it won't turn out just the other way?) Nor can I think of any other argument that honestly faces and solves the problem.

F. Michelman, Comments on Riker on National Planning, (Dec. 1975) (unpublished paper delivered at Liberty Fund conference on National Planning)

accepted, might work to explain judicial behavior that could otherwise be thought puzzling in the doctrinal areas of public purpose and delegation.

Beginning with the public purpose doctrine, imagine that a city government is about to use tax revenues to assemble a parcel of downtown real estate, which parcel it has specially negotiated to sell to a certain private developer for an amount somewhat below acquisition cost. The developer will be committed to construct and operate a hotel and a parking garage on the site. One hundred parking spaces will be made available at no charge to the city for use as a public parking facility. The city, all admit, would otherwise have deemed it worthwhile, in the interest of downtown revitalization, to assemble a site and develop 100 spaces itself, at a cost slightly in excess of the loss it will realize from buying the site for a higher price than it will get from the developer on resale. At the same time, the developer's financial plans disclose his anticipation of an immense profit on the deal, of a magnitude that dwarfs any reasonable appraisal of the modest net benefit that the city expects to derive.⁵⁰ The city council has approved the deal.

⁵⁰Alert, economics-minded readers may have questions about the economic logic of the example: *First*, what is the economic (or legal) justification for the city's acting to acquire the site for the developer rather than letting him acquire it privately? *Second*, how is the developer (in effect) able to sell to the city 100 parking spaces for less than it would cost the city to accomplish "in house" construction of the same spaces on the same site? *Third*, why should the assembled site be sold by special negotiation to a developer who anticipates a huge profit—rather than, for example, offered at auction where someone willing to accept a more modest profit might confer on the taxpayers the benefit of a higher price?

Possible answers are: *First*, it may be believed that an integrated, large-scale development represents the most efficient use for this land area, but that problems associated with fragmented ownership (including hold-out/free-loader problems and clouded titles) are blocking such development from arising in the market. *See, e.g.,* Davis & Whinston, *The Economics of Urban Renewal* 26 LAW & CONTEMP. PROB. 105 (1961). In this situation, exercises of eminent domain powers will be an effective and legally available solution. *See, C. HAAR, LAND-USE PLANNING*, 423-47 (2d ed. 1971). The city's possession of eminent domain authority, then, explains its site-assembly role. *Second*, the developer may have a development-cost advantage over the city for the 100 parking spaces, by reason either of economies of specialization, *see, e.g.,* A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Bk. I, ch. I (Modern Library ed. 1937), or of scale or other economies arising out of his doing other development work in the neighborhood simultaneously with construction of the parking spaces. *Third*, the size of the developer's anticipated profit may represent the high level of risk in his line of business, or a long lead time and large volume of entrepreneurial effort invested in "packaging" the deal, or a return to a rare and socially valued feat of entrepreneurial imagination. The city's willingness to negotiate such sales on terms allowing large profits may reflect a judgment that no practical alternative is better calculated to maximize the social benefits from such entrepreneurial feats. A simple auction sale to the highest bidder gives no opportunity to extract public benefits such as cheap parking spaces (or, in other words, risks allowing the highest bidder a larger share of the surplus than he would be willing to accept.) An auction sale with a minimum price (aimed at reserving some minimum amount of surplus for the taxpayers) risks driving away too many bidders. Advertising the possible availability of the site, and a willingness to negotiate with interested developers, may seem the best alternative. (Of course there is another possible explanation for the city's intervention, the negotiated sale, the developer's large profit—*i.e.,* developer influence on the conduct of city officials. That possibility is considered in the text. The point of this note is just to confirm that there *may be* (a court cannot as a matter of *logic* say there isn't), from the standpoint of city residents and taxpayers, an economically valid rationale for the city's part in the deal.)

A city taxpayer is seeking to enjoin the city from proceeding, on the sole ground that the deal will involve expenditure of tax revenues for a non-public purpose. The plaintiff does not dispute the legality of spending public funds on revitalization or on parking spaces reasonably deemed necessary to revitalization. The objection, rather, is to the private developer's profitable involvement. No statutory or constitutional text is cited, but all concerned take it for granted that some sort of public purpose limitation is implied either in the constitutional grant of taxing power to the state or in the state constitution's due process guaranty.⁵¹

Faced with this sort of problem, a court seems to have a choice among at least four strategies for review:

(1) *Strictly procedural review*. The court looks only to see that the city council in reaching its decision has complied with the legislative procedures established by or under the constitution, statutes, and home rule charter if any, and that no specific rules against bribery, conflict of interest, or the like, have been violated. The court refuses to reexamine the merits or even the bare substantive rationality of the council's judgment.⁵²

(2) *Ad hoc substantive (rational basis) review*. The court ascertains whether a city council, acting in good faith, could rationally conclude that the total (net) benefits to municipal citizens from this particular deal

⁵¹See note 7 *supra*.

⁵²This is the stance recommended by Posner, *The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 26-31. See also ECONOMIC ANALYSIS, *supra* note 2, at 495-96. It isn't clear that the courts in any American jurisdiction actually carry self-restraint this far. The most likely candidate may be the post-New Deal United States Supreme Court. Cf., e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976) (extreme deference to legislative classifications when reviewing economic regulations under equal protection clause). Yet that Court's abstemiousness in "economic" cases more certainly reflects a restrictive view of a national court's role in a federal system than a doubt about the existence of a substantive, judicially enforceable legal doctrine restricting exercises of public powers to public purposes. That such a substantive doctrine is a component of the Fourteenth Amendment's due process guaranty was expressly declared in *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896). In *Green v. Frazier*, 253 U.S. 233 (1920), the Court accorded a highly restrained review in a "public purpose" case, explaining (*id.* at 239-40, 242): "[T]he people, the legislature, and the highest court of the State have declared the purpose . . . to be . . . public . . . and within the taxing power of the State. With this united action of people, legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the Federal constitution [including an acknowledged right not to be taxed for a nonpublic purpose, citing *Fallbrook*, *id.* at 2383] have been violated. . . . [What is] . . . a public use [is] a question concerning which local authority, legislative and judicial, has special means of securing information . . . and . . . the judgment of the highest court of the State declaring a given use to be public . . . [will] be accepted by this court unless clearly unfounded." In *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937), the Court again accorded a substantive—though restrained—review, saying (*id.* at 514): "It is not denied that since the adoption of the Fourteenth Amendment state taxing power can be exerted only to effect a public purpose . . . [but] the requirements of due process leave free scope for the exercise of a wide legislative discretion" The views expressed in *Fallbrook*, *Green*, and *Carmichael* have never, so far as I am aware, been repudiated by the Court.

(including those from the public good of revitalization) will exceed their total (net) tax and other costs, and on that basis grants or denies relief.⁵³

(3) "*Per se*" or categorical substantive review. The court ascertains whether the project entails in any degree the use of the city's taxing power in direct aid of a particular private enterprise, and on that basis grants or denies relief.⁵⁴

(4) *Primary-purpose or weighing-of-benefits review*. The court ascertains whether the private benefits to the entrepreneur clearly predominate over the public benefits, and on that basis grants or denies relief.⁵⁵

First note that courts in such cases rarely, if ever, purport to limit themselves to strictly procedural review (which would amount to rejecting the public purpose doctrine).⁵⁶ This fact suggests that the "big bribe" justification of the welfare state has not been strongly operative in the judicial mentality.

⁵³This is probably the typical judicial stance. The substantive conception of a "valid" legislative decision as one calculated to yield social benefits in excess of social costs is combined with an institutional posture of judicial deference to legislative judgments about such questions, within the bounds of plausibility or "rationality." See, e.g., *Wilson v. Board of County Commissioners*, 327 A.2d 488, 498, 499 (Md. 1974) (legislative expenditure decision must "be reasonable and based on . . . honest judgment . . . that the expenditure is for the best interests of the city;" whether private firm will also benefit is "not a critical factor.")

⁵⁴See *Foster v. Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *Lowell v. City of Boston*, 111 Mass. 454 (1875) (following exception for privately owned public utilities). Many state constitutions contain express prohibitions against "lending of credit" to any "corporation" or "private" organization. Such prohibitions are sometimes construed by courts to bar all financial truck with private enterprise. E.g., *Port of Longview v. Taxpayers*, 84 Wash. 2d 475, 527 P.2d 263 (1974), *modified*, 85 Wash. 2d 216, 533 P.2d 128 (1975). Such decisions, however, are not directly relevant to my argument. See text accompanying notes 5, 6 *supra*.

⁵⁵A clear and striking example is *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 221 A. 2d 138 (1966). In *Basehore v. Hampden Industrial Dev. Auth.*, 433 Pa. 40, 28 A. 2d 212 (1969), the court sought to distinguish the *Price* case and to deny that it had there used a primary-purpose constitutional test, explaining that (i) in *Price* there wasn't any "substantial" public benefit and (ii) the *Price* decision turned on interpretation of an enabling statute, not on any constitutional public-purpose doctrine. But this retrospect on *Price* is thoroughly unpersuasive, because: (i) the *Price* opinion (221 A. 2d at 150-51 n. 35) expressly stipulated that "we find it unnecessary to reach the issue of whether the Authority had acted unreasonably in concluding that present and anticipated future need in the locale of the proposed garage facility were sufficient to warrant its construction. Assuming arguendo the existence of such need, the Authority may not propose to meet it through the medium of a project which results in an overwhelming and predominate benefit to private developers;" and (ii) while it is technically correct that in *Price* the court held that the challenged deal was unauthorized under the "public benefit" language of the enabling statute, it is also true that the opinion's argument is founded on an analogy to the constitutional "public use" restriction on eminent domain powers, and that the opinion speaks in tones suggesting a question of broader significance than the meaning of a parking authority enabling act.

It should be noted that some jurisdictions, and some single decisions, appear to require, for a valid public expenditure, both a substantial net public benefit and relegation of any non public benefit to a secondary or "incidental" magnitude. Compare *Wilson v. Board of County Commissioners*, 327 A.2d 488 (Md. 1974) with *City of Frostburg v. Jenkins*, 215 Md. 9, 136 A. 2d 852 (1957) (upholding industrial development bond; restrained judicial review; "whether . . . private benefits outweigh . . . public benefits . . . [is] primarily a legislative rather than a judicial problem"); see *Opinion of the Justices*, 369 N.E.2d 447 (Mass. 1977); *Port Authority of City of St. Paul v. Fisher*, 275 Minn. 157, 145 N.W. 2d 560 (1966).

⁵⁶See note 52 *supra*.

Under that conception, it will be recalled, we buy civil peace for the price of abiding by whatever the duly constituted legislative process presents us with.⁵⁷

Many courts, applying the public purpose limitation, will purport to follow our second path, of *ad hoc* rational-basis review. This might seem at least consistent with a market-failure justification of the welfare state, insofar as a reasonably anticipated surplus or deficit, as the case may be, of social benefits from a public good (revitalization) over political costs (taxes) represents a net positive or negative contribution to the total long-run, public-sector benefit-cost balance which, when distributed over the citizenry, can supposedly make each better off than would have been possible without welfare-state activity. Yet one may well ask why procedurally regular and non-corrupt legislative (city council) approval is not itself deemed sufficient to provide this assurance, without any substantive judicial oversight. A plausible (though certainly not a logically irresistible) answer is that restrained, rational-basis judicial review simply provides a cost-effective screening device to catch some obvious, legislative mistakes which would otherwise inevitably occur from time to time—because legislators, too, are fallible—and detract from the long-run total benefit-cost balance.⁵⁸ Thus it seems at this point

⁵⁷Professor Posner, whose normative theory and positive model of politics and legislation seem closely akin to what I have been calling the "big bribe" theory, believes (it would seem correctly) that total judicial abstention from "public purpose" review is an implication of the theory. If particular legislation is not designed to contribute to social welfare (because it is purely responsive to private interests operating as "pressure groups"), it makes no possible sense for courts to treat the legislation on the assumption that it is so designed. See Posner's discussions cited in notes 44, 54 *supra*.

Still, it could always be argued that the "duly constituted" process includes a step of substantive judicial review; but if we follow that path the big bribe conception will, from the judicial standpoint, just collapse into some other conception. Suppose the judge infers from some authoritative source or text (*e.g.*, the due process clause of the state or federal constitution) that the legislature's public expenditure decisions are supposed to be subject to some sort of substantive judicial check for "suitability," or "propriety" or whatever. If all the court can tell (from the texts and from authoritative history) about the *reason* for thrusting this vaguely defined role upon it is that such was part of the constitutional settlement by which civil peace was to be established, it will still have to find some way of answering the open questions about the precise standards, or purposive guides, to be used in performing the role. If the court for some reason has adopted economic efficiency as its residual guide (for use when the sacred texts run out), it will be driven to decide what standard (from among numbers (2), (3), and (4), see notes 53-55 *supra* & text accompanying, or some variant of those) best accords with some economically plausible account of American governmental institutions and practices. So the economics-minded judge in this situation will have to fall back from the big-bribe account to the market-failure account, or something like it.

⁵⁸See Michelman, *Property, Utility, and Fairness: Comments On the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1177-78 (1967).

Another imaginable answer would be that a judicial determination of "no public purpose" represents a judicial finding of inefficiency *plus* a judicial perception (or intuition) that the measure under review is a product of one of those occasions of "political failure," of economic misfire of the self-interest motivated political process, referred to in note 48 *supra*—so that the judicial finding of inefficiency is *not* contradictory of any genuinely opposed legislative result. But while this answer is imaginable, it is hardly plausible. Partly for reasons yet to be explored, the notion that courts by some mental process could even *intuit*, much less *perceive*, that some particular measure was especially likely to be a "misfire" case, is, well, fantastic. See note 102, *infra*.

that either procedural review only, or procedural plus rational-basis review, might be reconcilable with a market-failure account (though only procedural review is consistent with a big-bribe account).

But if that much be granted, then why should courts applying public purpose ever lapse—as some courts sometimes do—into the *per se* or categorical mode of review in which direct governmental aids to private enterprise are automatically ruled out regardless of their apparent net positive contribution to the long-run public-sector accounts?⁵⁹ To see how the public-choice model can also accommodate this *per se* variation, first consider the fourth review strategy which some courts use: the “primary purpose” or “weighing-of-benefits” approach. Applying that approach to our hypothetical case, the court would ascertain that the private benefits to the developer clearly overshadow the public benefits and on that basis would grant relief. But why deprive the public of even a modest benefit—a modest positive contribution to the long-run public-sector balance—just because the developer benefits hugely?

The answer, in a public-choice framework, can only lie in residual mistrust of the integrity of the legislative process—or more precisely, in the representation element in that process. The very fact that the total surplus from the land-development transaction is divided so unevenly between the developer and the city may raise suspicion that the legislators have not really been pursuing the interests of their constituents but rather have been “captured” by the private interest in some obscure or subtle way that bribery and conflict laws cannot touch, and restrained substantive review cannot detect. Confidence that surpluses from exercises of governmental powers will be widely and evenly enough distributed to assure that everyone will be a long-run net gainer may depend significantly on the legislative representative’s always being actually responsive to popular, constituent interest.⁶⁰ Periodic electoral accountability is supposed to induce such responsiveness through the medium of legislator self-interest (in retaining office, or at least in raising campaign contributions). Maldistribution of surpluses to private parties might so strongly suggest the presence of a countervailing legislator self-interest that a wisely fashioned public-choice system would program courts in such cases to intervene prophylactically.⁶¹ Categorically ruling out all specially negotiated governmental assistance to private enterprise—that is, the *per se* rule—would just be a more extreme version of the same type of prophylaxis.

So it seems, at least to this point, as though *any* of *three* versions of judge-created public purpose doctrine—the rational-basis, primary-purpose, and *per se* or categorical variants—can plausibly be reconciled with an in-

⁵⁹See note 54 *supra* and accompanying text.

⁶⁰That is, whatever such confidence is able to survive the skeptical literature described in note 48, *supra*.

⁶¹The opinion in *Price v. Philadelphia Parking Auth.*, 422 Pa. 317, 221 A.2d 138 (1966), certainly suggests this sort of concern.

dividualistic type of normative economic model of government, depending on what the model's design details are supposed to be. That might seem a pretty bit of evidence to support a general thesis that individualistic economics is the hidden inspiration of judge-made doctrine even in public law. Yet a small fly in that ointment is an awareness that a fourth and rarely professed option—rejection of public purpose as a judicially enforceable substantive limitation in favor of strictly procedural review—is also consistent with a plausibly designed public-choice model.⁶²

Let that problem rest for a moment. A second intriguing pattern of judicial behavior concerns a small portion of delegation doctrine represented by a trio of Supreme Court decisions which, taken together, have posed a long-standing puzzle to legal theorists.

Case I: *Eubank v. Richmond* (1912).⁶³ The Virginia legislature had by statute authorized city councils "to make regulations concerning the building of houses . . . , and in their discretion, . . . in particular districts . . . to prescribe and establish building lines" The Richmond City Council thereupon adopted an ordinance providing, in effect, a procedure whereby two-thirds of the owners along any block could adopt their own building setback line for their block. That procedure was used to establish a line that would have required the plaintiff to alter his plans for a house not yet built. The Supreme Court held that allowing the ordinance thus to be enforced against the plaintiff would unconstitutionally deprive him of his property.

Although the Court's opinion hints at a straight substantive due process objection to legislative regulation of building lines (the year, remember, was 1912), the opinion as a whole (and subsequent decisions) makes clear that the decision does not rest on that. The crucial objection was, rather, to the delegation feature of the Richmond ordinance which "enable[d] the convenience or purposes of one set of property owners to control the property rights of others." Because the ordinance "create[d] no standard by which [this] power [was] to be exercised," those exercising it might "do so solely for their own interest or even capriciously."⁶⁴

Case II: *Cusack v. Chicago* (1916).⁶⁵ The Supreme court upheld a city ordinance which excluded billboards from predominantly residential blocks except when a majority of the owners in the block would give written consent. The unsuccessful plaintiff was a would-be sign builder who, apparently

⁶²See note 52, *supra* and accompanying text. If the public-choice model is so supple that it can be reconciled with things courts *don't* do, as well as with various (mutually inconsistent) things various courts *do* do, then what does it *explain*? A theory that can logically claim to explain whatever might be observed, and so is not empirically falsifiable (e.g., the theory that whatever happens is the mechanical result of chains of collisions of particles set in motion at the Creation), doesn't explain *anything*. See Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. 335, (1974) [hereinafter Posner II] "It is, of course, a weakness rather than a strength in a theory that it is so elastic as to fit any body of data with which it is likely to be confronted."

⁶³226 U.S. 137 (1912).

⁶⁴*Id.* at 144.

⁶⁵242 U.S. 526.

unable to garner majority consent, attacked the ordinance on delegation grounds, complaining that it left his fate to "the whims and caprices" of his "neighbors."⁶⁶ Not surprisingly, he leaned heavily on *Eubank*. The Court pulled this prop from under him by reasoning that the delegation feature of the Chicago ordinance could only help him, not hurt him. *Eubank* was distinguished on the ground that there it was the unofficial body of self-interested neighbors who did the dirty work of imposing the prohibition, while in *Cusack* it was the city councillors who did that, while the neighbors were simply empowered to confer the favor of an exception: "The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power" ⁶⁷ Justice McKenna, author of the *Eubank* opinion, dissented.

Case III: *Washington ex rel. Seattle Title & Trust Co. v. Roberge* (1928).⁶⁸ A landowner wishing to construct a charitable home for aged poor persons in a residentially zoned area, but apparently unable to gain the consent of neighboring landowners, successfully challenged the constitutionality of Seattle's zoning provision permitting "a philanthropic home for children or for old people . . . in first residence district when the written consent shall have been obtained of the owners of two thirds of the property within four hundred (400) feet of the proposed building."⁶⁹ This provision was a 1925 amendment to a pre-existing ordinance which had simply omitted such homes from the list of uses allowed in the first residence district. Given the less-than-satisfying earlier decisions with which the Court had to cope, perhaps it is not surprising that its *Roberge* opinion is a welter of confusion and inconsistency from which it is impossible to extract any precise, uncontradicted statement of the constitutional defect found in the Seattle ordinance:

The right of the [owner] to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record⁷⁰ make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with . . . general welfare. The enactment itself plainly implies the contrary. . . . The section purports to give the owners of less than one-half

⁶⁶*Id.* at 529.

⁶⁷*Id.* at 531.

⁶⁸278 U.S. 116.

⁶⁹*Id.* at 118.

⁷⁰The tract "is located about 6 miles from the business center of Seattle, on a tract 267 feet wide, . . . having an average depth of more than 700 feet and an area of 5 acres The structure would be located 280 feet from the avenue on the west and about 400 feet from the lake on the east, cover 4 per cent of the tract, and be mostly hidden by trees and shrubs. The distance between it and the nearest building on the south would be 110 feet, on the north 160, and on the west 365." *Id.* at 117.

the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the [owner] from using its land for the proposed home They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the [plaintiff] to their will or caprice The delegation so attempted is repugnant to the due process clause of the 14th Amendment. *Eubank v. Richmond*

Thomas Cusack v. Chicago . . . was held unlike *Eubank v. Richmond*, supra, and the ordinance [there] was fully sustained. The facts found were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of [residential] districts It is not suggested that the proposed new home for aged poor would be a nuisance The facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be offensive.

As the attempted delegation cannot be sustained, and the restriction thereby sought to be put upon the permission is arbitrary and repugnant to the due process clause . . . the [owner] is entitled to have the permit applied for.

We need not decide whether, consistently with the 14th Amendment, it is within the power of the state or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration.⁷¹

Highlighted and reduced to its essentials, the logic of the Court's discussion comes to this: (1) The facts do not themselves suggest that the plaintiff's proposed rest home would be so disturbing to neighboring land uses as to call for restrictions on the plaintiff's free use of its property. (2) Nor has the city legislature exercised the responsibility of determining that the potential disturbance to others is such as to justify restricting the plaintiff's freedom. (3) So the Seattle scheme is simply one for sacrificing the plaintiff's freedom to the caprice of his neighbors. It is thus just like the scheme condemned in *Eubank* and it is, just as that one was, an improper attempt to delegate legislative power which violates the due process guaranty. (4) Of course the form of the Seattle scheme is of the kind which the Court held in *Cusack* is not a delegation of legislative power at all (that is, it empowers neighbors to lift a legislatively imposed restriction, not to impose a restriction themselves)—which was admittedly the reason given in *Cusack* for distinguishing that case from *Eubank*. (5) But this case differs from *Cusack* in that there the facts showed billboards to be noxious intruders in residential neighborhoods, while here the facts fail to indicate that the plaintiff's rest home would be a noxious intruder in its neighborhood. So the plaintiff's property rights prevail and it does not matter whether the scheme is labeled a delegation or not. (6) Given the delegation feature in the Seattle scheme, it is unnecessary to decide in this case whether this Seattle ordinance would have violated this plaintiff's constitutional property rights if the ordinance had flat-

⁷¹*Id.* at 121-123.

ly excluded all rest homes from the first residence district. (7) On this inconclusive and mystifying note the Court ends.

Now one wants to think that there must be better, truer reasoning than that to support the Court's conclusion not only that the Seattle ordinance should be struck down but also that both the *Eubank* and *Cusack* decisions should be reaffirmed.⁷² As presented, after all, the three cases form a puzzling triangle. The *Cusack* Court's professed reason for upholding the Chicago scheme, while reaffirming disapproval of the Richmond one, seems an unconvincing triumph of form over substance. But if that formal distinction is taken seriously, the Seattle scheme is like Chicago's, not Richmond's; and yet Seattle's scheme is treated like Richmond's, not Chicago's—that is, it is invalidated. What is needed is to see whether economically inspired public-choice thinking can help one get beneath the Court's inadequate formal analysis so as to reach more telling explanatory factors that can reconcile the actual decisions.

The exercise may begin by deepening bewilderment. Viewing the *Eubank* and *Roberge* cases through the lens of public-choice theory, which regards governmental power as intentionally responsive to the private concerns of individuals, those decisions seem more wrong than ever. It seems as though the decentralization schemes were a refinement and purification, rather than a corruption, of privatistically geared democratic process. Since no one need be concerned about the existence or location of a setback line or rest home except the owners and residents in the immediate vicinity, the decentralization schemes have the seemingly desirable effect of maximizing the direct influence in each such decision of the individuals directly affected by it. The insight that participants in the process would each look out for their own private interests, being the very assumption of economic theories of government, can hardly count as a valid objection. Nor, for the same reason, can it be objectionable that the affected individuals act for themselves directly rather than through the imperfect and corruptible medium of legislative representation. One's puzzlement may be reinforced by looking forward in time to 1936 and Justice Sutherland's opinion for the Court in the *Carter Coal Company* case, invalidating, on delegation grounds, a congressional authorization and incentive to coal producers and miners to enact by majority rule a legally enforceable labor code for their own industry.⁷³ The Court called the congressional scheme "legislative delegation in its most obnoxious

⁷²The reasoning in *Roberge* has often found confused. See e.g., Hogue, *Eastlake and Arlington Heights: New Hurdles in Regulating Urban Land Use*, 28 CASE W. RES. L. REV. 41, 48-51 (1977). [hereinafter cited as Hogue] We can grant the legal realists their predictable claim that the best explanation for any logical inconsistencies among the decisions lies in such extra-doctrinal factors as turnover in the Court's personnel, changes in political ideologies or relative influence of Justices, etc. Our question nevertheless persists, for we are looking at things from the standpoint of the Justices who issued and agreed to the *Roberge* opinion, and trying to figure out how they could have thought the three decisions were mutually consistent.

⁷³*Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others" participating in and subject to the regulatory scheme.⁷⁴ And yet in economic theory legislative officials are *not* "presumptively disinterested" but rather *supposed* to pursue the particular interests of their constituents.

On second look a good market-failure explanation for the *Eubank* decision may be detected. In both variants of the normative economic theory of government,⁷⁵ government is regarded as a necessary evil—a generator of political externality costs worth bearing only because and insofar as they replace even larger market externality costs. The latter are the costs of discoordination resulting from market failure.⁷⁶ Market failure is a problem typically associated with high transaction costs arising out of strategic behavior in large-number bargaining situations. But the Richmond Council's very act of adopting a blockfront decentralization scheme implies its judgment that the relevant bargaining group—consisting of the property owners within a relevant spillover area—need be no larger than the number of owners within a block; and that number may be small enough that the transaction costs should not be expected to overwhelm a private-market deal binding each owner to a restrictive covenant establishing a consensually accepted building line.⁷⁷ Thus there may be insufficient market-failure justification in

⁷⁴*Id.* at 311.

⁷⁵That is, the "big-bribe" and "market-failure" variants. See text accompanying notes 40-46, *supra*.

⁷⁶The big bribe variant focuses on the costs of predation and defense in a state of nature.

⁷⁷See B. SIEGAN, *LAND USE WITHOUT ZONING* 77-84 (1972); Ellickson, *Alternatives to Zoning: Covenants, Nuisance, Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 713-19 (1973). The crucial importance of group size, and the sharply lesser likelihood of strategic factors preventing joint pursuit of the convergent aims of members of small groups, are explored at length in M. OLSON, *THE LOGIC OF COLLECTIVE ACTION*: (1965) [hereinafter cited as Olson].

Application of Olson's analysis to the problem of controlling land uses across a given area is a bit complex but worth trying to work out. From an economic standpoint, the basic question to be asked about any contemplated restriction, or scheme of restrictions, on uses which owners within the area would otherwise be legally free to make of their respective parcels of land, is whether the restriction or scheme would be *efficient* in the sense that the total of the private exchange values of the benefits it would bestow exceeds the total of the private exchange values of the detriments it would impose. Only if the answer to that question is "yes" is there even the possibility of a problem of market failure which might be (partially) rectified by coercive, majoritarian governmental action; and likewise, in terms of Olson's analysis, it is only if that answer is "yes" that we can properly speak of the aggregation of owners within the area as constituting (*vis-a-vis* the question of imposing the restrictive scheme) a "group"—"a number of individuals with a common interest." (*Id.* at 8).

Their "common interest" of course, is just that of getting the efficient scheme imposed if there is one. We have already (See notes 43-46, *supra* & text accompanying) noted some reasons why strictly voluntary, private action, in the form of a multilateral market exchange transaction, might fail to hit upon and impose an actually efficient restrictive scheme. Olson's thesis focuses on the size of the group of owners in the area as an important factor affecting the probability of such market failure, saying that the probability increases with increasing size of the group.

One of Olson's points is the simple and obvious one that the transaction costs of concluding a voluntary arrangement will increase with increasing size of the group (see OLSON at 46, 48)—a

this case for any regulatory intervention with its ever-attendant threat of severe political externalities. The significance of the Richmond scheme's decentralization feature, then, would be its implication that spillovers from building set-back decisions are not believed to extend beyond a block or so, making it feasible to hope for internalization through voluntary, consensual dealings within a blockfront-sized group.⁷⁸ This account ties in nicely with the

point having special significance (*see id.* at 42) in cases, such as those we are considering, where lack of unanimous agreement will likely mean no deal at all (because (a) just one parcel with billboards can blight the whole block, and (b) the worst situation of all is to have had *your* land restricted while some neighbor's is left unrestricted, and (c) the best situation of all is to own the only unrestricted lot in the block).

But Olson's analysis takes us beyond this obvious point regarding transaction (organizational) costs to a quite distinct (though complementary) feature of group size—a feature most easily perceived if we artificially divide the potential voluntary transaction into the two stages of (i) identifying the several, and the total, private valuations of the costs (detriments) of a restrictive scheme, and (ii) arranging for payment of those costs by those owners (or some of them) for whom the private valuations of the scheme are positive. Stage (i)—securing complete and honest reports from each owner in the area of how much monetary compensation (if any) will be needed to prevent adoption of the scheme from injuring his or her net welfare position—obviously entails transaction costs which will increase with the number of owners who must be heard from. But, according to Olson's analysis, the likelihood of successful completion of stage (ii) depends on group size for reasons in addition to transaction costs. Once the total compensation-payments bill is known to all those owners who regard the scheme as beneficial, *the group composed of those beneficiary owners* may be, in Olson's terminology, either a "privileged," or an "intermediate," or a "latent" group. (*See id.* at 49-51.) The beneficiary group is *privileged* if at least one of its members values the group's "collective good" (*i.e.*, imposition of the restrictive scheme) so highly as to find it worthwhile to pay all necessary compensation payments himself; the group is *intermediate* if it has no such member and also "does not have so many members that no one member will notice whether any other member is or is not helping to provide the collective good;" and it is *latent* if each of its members thinks that whether or not he or she contributes to the effort to obtain the collective good (the restrictive scheme) is a circumstance that will make no practical difference to the other members and so will go unnoticed by them. The crucial conceptual distinction between intermediate and latent groups thus is one pertaining to *incentives*: each member of a latent group has reason to think that the collective good is as likely to be provided if she does not contribute as if she does, so there is an incentive for each to withhold voluntary contribution. But each member of an intermediate group is in a position to see that her failure to contribute may lead others to refuse, and so result in her not obtaining the desired good; and so there is some incentive to contribute. Olson arrives at two related conclusions from this analysis, which certainly are consistent with intuition: *First*: whether a group is privileged, intermediate, or latent is likely to depend significantly on group size—with smaller groups being more likely to be privileged and larger groups being more likely to be latent. *Second*, with a privileged group there is a reasonable expectation that a collective good (such as an efficient scheme of land use restrictions) will be provided by voluntary private transactions with no special effort at group coordination or organization; with a latent group such a good will not be provided except through some coercive framework (such as a majoritarian legislature); and with an intermediate group the good may possibly (or may not) be provided without coercion, but some special coordinating or organizational effort will be needed.

The upshot is that increasing size of a group of potentially affected landowners hurts the group's chances of voluntarily (extra-governmentally) adopting an efficient scheme of land use restrictions in two distinct though complementary ways: (1) the larger the group, the higher the transaction (organizational) costs; and (2) the larger the whole group, the larger (probably) the subgroup of potential beneficiaries, and, therefore, the less likely that subgroup is to fall within the "privileged" or "intermediate" category.

⁷⁸The argument is a normative twist on a positive hypothesis advanced in Posner II, *supra* note 62, at 345; "[T]he demand for regulation . . . is greater among industries for which private cartelization is an unfeasible or very costly alternative—industries that lack high concentration

later decision in *Gorieb v. Fox*,⁷⁹ upholding a city council's regulation of building setbacks, fixed on a block-by-block basis, against substantive due process attack and distinguishing *Eubank* on the delegation point. In defending the ordinance the Court suggested a number of conceivable virtues of block-long uniform building lines. Most of these were plainly of the sort that are significant only within short range (roughly, a single block)—for example, protecting each parcel from shadows cast by buildings on the others. But, significantly, at least one of the *Gorieb* Court's justifying factors—the safety hazard to traffic at corners where visibility is impaired by curbside construction—is a spillover of at least citywide dimension. On the economic view we are now developing, the difference between *Gorieb* and *Eubank* is just that in the latter case the Richmond Council had excluded consideration of citywide spillovers by decentralizing the decisions to blockfronts.

Now how well does all this work for *Cusack*, *Roberge*, *Carter Coal*? In *Roberge* the Seattle Council's scheme would, by analogy with our treatment of *Eubank*, imply its belief that spillovers from a rest-home subside into insignificance beyond four hundred feet from the home. In a developed residential area one might easily expect to find thirty or more homeowners within a 400-foot radius of any point⁸⁰—quite possibly in excess of the "small

and other characteristics favorable to cartelization. They lack good substitutes for regulation." Compare Buchanan, *supra* note 43, at 444-45.

Constrast the solution to the *Eubank/Cusack* puzzle offered by R. HALE, FREEDOM THROUGH LAW 364 (1952) [hereinafter cited as HALE]:

(1) As noted by McBain, *Law-Making by Property Owners*, 36 POL. SCI. Q. 617 (1921), the *Cusack* ordinance "could reasonably have been supported as a protection of [neighborhood] property values;" and if so, provision for waiver of protection by the (only) potentially affected property owners would have been "reasonable." [But see note 117, *infra* and text accompanying.]

(2) "On the other hand, the justification for an ordinance which requires buildings to conform to a street line may be thought to lie, not in the protection of the value of property abutting the same street, but in the general convenience or beauty of the city."

(3) But conditioning a land-use restriction on neighborhood action or waiver is "reasonable" only if protection of interests contained within the neighborhood—and not some citywide interest or "more general consideration"—is the justifying aim of the restriction.

(4) It follows from (1), (2), and (3) that the delegation feature was "reasonable" in the signboard case but not in the building-line case; or, putting the same conclusion somewhat differently, that inclusion of the delegation feature in the *Eubank* building-line ordinance is consistent only with a view of that ordinance as aimed at protecting neighborhood rather than citywide interests, and on that view of it the ordinance fails the substantive due process test of relationship to a valid and significant societal interest (because, according to (2), "the justification" for such an ordinance is "thought to lie [only] in the general convenience or beauty of the city.

But this attempt to reconcile *Eubank* and *Cusack* seems fatally flawed by the arbitrariness of (2)—of "thinking" that only citywide interests, not localized neighborhood concerns (as reflected in "property values"), can rationally justify a building-line ordinance. Armchair reflection seems sufficient to banish any such "thought." If authority also is required, see the Supreme Court's opinion in the *Gorieb* case, discussed in text immediately following.

⁷⁹274 U.S. 603 (1928).

⁸⁰A circle with a radius of 400 ft. has an area of $(400)^2 \pi = 507,456$ sq. ft. A quarter-acre building lot has an area of about 11,000 sq. ft.

number" of bargainers for whom strategic transaction costs are expected to remain tolerable.⁸¹ On the other hand, the Court's description of the case suggests that the number actually involved there may have been much smaller.⁸² Perhaps an efficient legal system would forbear from such a "microscopic"⁸³ examination of the facts of particular cases. If so, then *Roberge* could be viewed as consistent with *Eubank* in terms of an economically justifiable general rule rejecting land-use regulation schemes which are decentralized to the "neighborhood" scale, because of the general likelihood that at that scale the market externalities arising from bargaining strategy are unlikely to exceed the political externalities associated with collective decision.⁸⁴ *Carter Coal* is just a bit harder to deal with. On the surface it would seem that the numbers of individual producer firms and miners, the units which would have been organized into majority-rule regimes by the Bituminous Coal Conservation Act of 1935, was very large indeed. The Court's recital of the facts does not, however, reveal the extent to which these individual agents might have already organized themselves into voluntary associations for purposes of negotiating labor agreements, and it is conceivable that the number of economically operative units had (as the Court somehow knew, but did not say) by such means been reduced to a small enough number that no further governmental intervention was needed to overcome the transaction costs of voluntary bargaining. Of course just suggesting this possibility discloses a broader and plainly more powerful economic interpretation of the *Carter Coal* delegation holding: If such collective-bargaining units had in fact been organized on either side, they would have been regarded by economists not as the benign outcome of voluntary transactions overcoming externalities and thereby achieving efficiency, but rather as economically damaging, anti-competitive, combinations in restraint of trade which obstructed the march towards efficiency.⁸⁵ The only externalities that would be overcome by such associations, whether voluntarily organized or imposed by the government, would be the merely "pecuniary" ones arising out of competition; and those externalities, not being regarded as economically evil or inefficient, would have provided no justification for the imposition of the political-externality costs implicit in majoritarian formulation of a Coal Code.

But whatever may be said about *Roberge* and *Carter Coal*, the proposed economic rationale for the *Eubank* decision will not suffice to explain the

⁸¹See note 77 *supra*.

⁸²See note 70 *supra*.

⁸³Compare Posner, *Impossibility and Related Doctrines in Contract Law*, 6 J. LEGAL STUD. 83, 103 (1977). [hereinafter cited as Posner III].

⁸⁴On the economic arguments favoring use of rules of thumb over particularistic application of broad standards, see *id.* at 95-96, 114; Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

⁸⁵See, e.g., ECONOMIC ANALYSIS *supra* note 2, at 239-41, 501.

Cusack case. If block-sized groups are not too large to deal economically⁸⁶ with building setback spillovers, neither are they too large to deal economically with billboard spillovers. The proposed theory seems to suggest, then, that the Chicago billboard ordinance should have been struck down because its block-by-block decentralization feature implied that billboard spillovers are block-sized in scale, and so could have been most economically handled by the unregulated market.

Economically inspired, public-choice thinking, however, offers another way to get at *Cusack*—one which has the happy virtue of giving some more-than-formalistic point to the Court's insistence that the Chicago scheme merely gave the neighbors the power to lift a restriction imposed by the Council, this being viewed as somehow different from giving them the power to impose their own restriction. Suppose the Chicago council had just flatly ruled billboards out of predominantly residential blocks. Normative public-choice theorists could argue that the billboard interests would have had no valid complaint, because this outcome would just have been one of a series over which they, presumably, like other interests, could expect to derive a net benefit from coordination which only government could achieve at a feasible transaction cost.⁸⁷ While the particular outcome (billboard exclusion from residential areas) is detrimental to them, other outcomes of the same legislative process presumably have been or will be beneficial. And this relationship of reciprocity is not supposed to be accidental. The billboard interests in *Cusack*, almost certainly a self-conscious and very possibly a formally organized interest-group, would have had a fair chance to fight their battle, to protect their interest, to engage effectively in political horsetrade, at the city council level. They in fact may have exacted some concessions respecting other legislative concerns of theirs during the process of building a legislative majority to enact the challenged ordinance. It may, indeed, seem especially plausible to think of them as having thus "given in" (for a price) to the ordinance, since it leaves them with at least a hope of prevailing in particular situations by obtaining neighborhood consents. But be that last point as it may, since the billboard interests cannot (in this public-choice vision) complain about a flatly prohibitory ordinance, they *a fortiori* can not complain about the one that gives them an escape hatch.

A comparison of the political opportunities available to the interests which turn out to be harmed in *Eubank* is instructive. For them, no comparable log-rolling opportunity ever seems to have existed. At least it is hard to imagine an anti-setback lobby mobilizing to oppose the Richmond ordinance in the City Council or exact concessions in respect of its enactment.⁸⁸

⁸⁶That is, with tolerable transaction costs. See note 77 *supra* & text accompanying.

⁸⁷See notes 43, 44 *supra* & text accompanying.

⁸⁸There may, of course, have been a self-conscious—even an organized—homebuilder or developer (vacant land owner) interest. But participants in such an interest could normally anticipate sharing in the benefits as well as in the burdens to be generated by the blockfront actions

The only trenchant legislative decision was made at the blockfront level, where no space or opportunity for political trade ever existed. The blockfront group was not a polity possessed of any breadth of substantive competence or even continuity of organized existence. The Madisonian or Dahlian vision of coalitions that form and re-form from issue to issue, of legislators exchanging support here for support there in an ever-shifting alignment of interest groups, making plausible an expectation that over the long run everyone would enjoy a net balance of political gains in excess of losses, had neither substantive nor temporal scope in which to operate. In the *Eubank* blockfront there would be one group of winners, one group of losers, on one, single, nakedly redistributive occasion.⁸⁹

So the effort to find an economic rationale for the *Cusack* decision suggests that a crucial element, in the market-failure version of the normative economic theory of how majoritarian government can serve everyone's individual long-run interest, is the theory of coalitions, of log-rolling, of "minorities rule" in Robert Dahl's arresting phrase.⁹⁰ Without that theory there can be no credible assurance that each individual will, over the long run, derive net advantage to his or her own, private interests from the majoritarian welfare state.

Having seen how log-rolling theory can thus provide an economic rationale for the seemingly opposed results in the *Eubank* and *Cusack* cases, it is necessary to consider how well that same rationale might also handle the decisions in *Roberge* and *Carter Coal*. As for *Roberge*, the answer is not very well at all. The objectionable regulatory scheme in *Roberge* arose out of two, successive, actions by the Seattle Council. The first action was adoption of a comprehensive zoning scheme in which rest homes were omitted from the list

made possible by the Richmond ordinance: They would own (or be building on) some parcels whose amenity value would be increased by more than their development value would be reduced by the various blockfront actions, as well as some parcels for which the balance would be the reverse. *A priori*, then, the enabling ordinance may for them have been no more a threat than an opportunity. By contrast, the Chicago billboard ordinance could work only to the disadvantage of firms in the outdoor advertising business: first, by destroying the value of outstanding leases (or negotiations for leases) in residential areas; second, by drastically reducing the supply of legally available billboard sites and thus driving up the price (in the forms both of rentals to owners and of "bribes" to neighbors in return for their consents); third, by reducing the total number of useable advertising locations available at feasible cost, and thereby reducing the total demand for billboard-related services such as site acquisition, construction, artwork, production, posting.

⁸⁹It is true, of course, that some blockfront owners might have been compensated by others (with, *e.g.*, money) for agreeing to vote in favor of the building line despite its injurious impact on their interests. But since a unanimous vote was not required, there would very likely be at least a few uncompensated, injured owners. See generally W. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962).

⁹⁰R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956). See also D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1958); A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1949); W. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* 45 (2d ed. 1965); E. HAEFELE, *REPRESENTATIVE GOVERNMENT AND ENVIRONMENTAL MANAGEMENT* (1973). The group-interest theory supported by Truman and Bentley, *supra*, is critically reviewed in OLSON, *supra* note 76, at 117-31.

of uses allowed in first residence districts. It obviously would be stretching a point too far to deny that the pendency of a comprehensive zoning bill before a city council affords a perfectly adequate—not to say an unusually fine—opportunity for all interests whose land-use activities would suffer restriction under the bill to defend themselves through normally available log-rolling channels.⁹¹ At any rate, one could hardly make that denial and still have much of any governmental regulatory competence left, and of course, one could not make it at all without (in our proposed economic frame of reference) outright rejection of the 1926 decision in *Euclid v. Ambler Realty Co.*⁹² The second action consisted of an amendment allowing rest homes in first residence districts if, but only if, the requisite consents were obtained from neighboring owners. From the standpoint of log-rolling theory, the total effect looks similar to, though possibly less obviously justifiable than that of, the Chicago City Council's action upheld in *Cusack*.⁹³

Application of the log-rolling theory to *Carter Coal* yields a more ambiguous result. On the one hand, *Carter Coal* seems to resemble *Eubank* in that in neither case were well-defined, interest-oriented decisions made by the constitutionally recognized legislative body (Congress or the Richmond City Council). In both cases the delegation was so vague or open that no one could really tell how he stood to gain or lose until specific proposals took shape in the irregular forum to which authority had been delegated, so that only in that forum could there have been any possibility of joint optimization through trade. On the other hand, *Carter Coal* seems to differ sharply from *Eubank* when attention is shifted to the make-up of the irregular forum's agenda. In *Eubank* that agenda was utterly flat and simple: one unidimensional issue, one resolution. By contrast, the agenda laid before the coal producers and miners by the Bituminous Coal Conservation Act of 1935—formulation of codes to govern production, employment, and marketing in the nation's coal industry—was, one would think, bursting with potential issues that could cleave the participants along many different axes into many cross-cutting proto-coalitions. Certainly one cannot conclude without closer investigation that there was no genuine possibility there of joint optimization through vote-trading.⁹⁴ *Carter Coal*, then, can perhaps be fitted with the log-rolling theory, but only by making a superficially dubious assumption about unexplored facts.

⁹¹See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1218, 1223 (1967).

⁹²272 U.S. 365 (1926) (upholding comprehensive zoning ordinance against substantive due process attack).

⁹³As compared with the Chicago outdoor-advertising industry, sponsors of "philanthropic homes for children or old people" in Seattle may seem less certain to have been an organized or organizeable interest group capable of effective lobbying at the city-council level.

⁹⁴Optimization, that is, from the standpoint of the participants. We have already seen that from a more inclusive, societal standpoint, the anticompetitive outcome of the code-making process could not be expected to be optimizing, see note 85 *supra* and text accompanying.

Pausing now to review, we have identified two distinct normative economic sub-theories of delegation: the small-numbers/low-transaction-costs sub-theory (henceforward the "small numbers theory")⁹⁵ and the log-rolling/thin-agenda ("log-rolling") sub-theory.⁹⁶ The small numbers theory adequately handles *Eubank* and *Roberge*, and covers *Carter Coal* by extension⁹⁷ but fails to explain *Cusack*. The log-rolling theory adequately handles *Eubank* and *Cusack*, covers *Carter Coal* only if stretched, and may fail to explain *Roberge*.⁹⁸ The obvious next move is to cumulate the two sub-theories. A normative economic account of government will then be seen to offer two separate reasons for invalidating certain legislative delegations: (i) that the group to which the delegation is made is so small as to contradict there being an economic justification for any collective decision at all, and (ii) that the delegation prevents the crystallization of issues, in an interest-oriented form, in any forum whose agenda is fat enough to accommodate joint optimization by log-rolling. It can then be said the the *Eubank* delegation was bad on both grounds, the *Roberge* delegation was bad on first ground, the *Carter* delegation was questionable (or worse) on both grounds and so certainly bad when the doubts are cumulated.

But *Cusack*, alas, remains a problem. *Cusack* looks like the same case as *Roberge*: a delegation bad on small-numbers grounds but not on log-rolling grounds. If either ground alone is supposed to be sufficient for condemning a delegation, then *Roberge* stands explained but *Cusack* does not; and if both together are supposed to be necessary for invalidity, then *Cusack* stands explained but *Roberge* does not. The only way finally to square all four cases is to show that, in normative economic thinking, the small-numbers objection should recede before an unusually strong showing of log-rolling opportunity in a constitutionally recognized legislative body. To any reader who has been willing to follow the economic *tour de force* this far, it will come as no surprise to be told that this, too, can be done—if with some effort.

As a prelude for this last triumphant step, it is necessary to shift attention momentarily back to the public purpose doctrine. It can now be seen that as between strictly procedural review (tantamount to a rejection of any justiciable, substantive public-purpose limitation)⁹⁹ and rational-basis review, only the former and not the latter truly fits the market-failure version of the economic theory of government—just as only the former fits the big-bribe version.¹⁰⁰ For in recognizing the crucial significance of log-rolling, one sees that the market-failure account depends not only on a conception of self-interested legislative traders—or of legislative traders self-interestedly responsive to self-interested constituents—but also on a conception of legislative out-

⁹⁵See notes 75-86 *supra* & text accompanying.

⁹⁶See notes 87-94 *supra* & text accompanying.

⁹⁷See note 85 *supra* & text accompanying.

⁹⁸See notes 91-94 *supra* & text accompanying.

⁹⁹See note 56 *supra* & text accompanying.

¹⁰⁰See note 57 *supra* & text accompanying.

put as not a series of discrete, separately intelligible and appraisable enactments, but rather a continuous unitary network of compromise—of implicit multilateral trade so complex as to be almost certainly opaque and indecipherable to any outside observer.¹⁰¹

The log-rolling element in the normative public-choice argument implies the indissoluble interconnectedness of all the moments of legislative activity, depriving an observer of all ability to individuate or isolate legislative acts for purposes of rational-basis appraisal. There just is no saying where one legislative transaction ends and another begins, if everything the legislature does is integrated into an endless, unfathomable process of implicit bargain and compromise. Since it is just *that process* over time, and no particular moment inside the process, that is supposed to redound to everyone's net private advantage, only the integrity of the process and not the virtue of the moments can ever be open to external—that is, judicial—appraisal.¹⁰²

A crude—but not, alas, quite fanciful—analogy should serve to drive the point home. Assume *P*, an individual, methodically ploughing under crops growing on his farm. Any objection that *P*'s behavior is wasteful is plainly ruled out by the subjectivist, individualist tenets of economics (once granted that those really are *P*'s land and *P*'s crops). One might want to say that *P*'s behavior discloses his insanity, so as to vitiate any ethical claim exerted by his subjectivity and justify restraining him; but caution is in order because one might, if one troubled to ask, discover that *P* was destroying his crops in return for a large monetary payment from *Q*. That news should end our suspicion of *P*'s mental health. It might at the same time raise a concern about *Q*, but she probably has an equally sane—though possibly idiosyn-

¹⁰¹Compare Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, (1973); J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 7-9 (1924).

¹⁰²This is the conclusive reason why it would be fantastic to think (see note 58 *supra*) that courts engaged in rational-basis review are responding to perceptions or intuitions of occasional political failure or misfire. In order to work *at all* as an economic rationale of the welfare state—in order to compete effectively in that role with the “big bribe” conception, as it incontestably has in the modern history of American political thought, *see, e.g.*, notes 45, 90 *supra*—the “market failure” conception must commit itself to the claim that the self-interest motivated, majoritarian legislative process has an economizing tendency over much or most of its constitutional range. The most that can be yielded to the skeptical wing of the literature, *see* note 48 *supra*, is that the process doesn't work *perfectly*, that *sometimes* it breaks down or fouls up. But given also the interconnectedness (discussed in the text) of all legislative episodes, *no one can possibly claim to know just where in the stream of legislative output the breakdowns have occurred*.

Of course it remains quite possible to think of judges identifying occasions when legislative measures impair interests to which such an extraordinarily high value is conventionally assigned that measures impairing those interests are presumptively inefficient; and one might include, in the explanation of why judges on such occasions intervene relatively unrestrainedly, the thought that judges can in such cases reasonably suspect that the political process must have been visited with “failure” (else it wouldn't—couldn't—have committed this enormity). But here we have hit upon a version of the economic theory of civil liberties and the Bill of Rights, *see, e.g.*, BUCHANAN & TULLOCK, *supra* note 45, at 73-74; compare J. RAWLS, *A THEORY OF JUSTICE* 205-21 (1971) [hereinafter cited as Rawls], and have left the domain of the “public purpose” doctrine.

cratic—explanation for her conduct, which could conceivably involve some sort of exchange offer from *R*. And so on. In the normative public choice model of legislation, there is never any way of ruling out the possibility of a network of obscure exchanges that would explain, if one could only see it, the rationality of all votes cast in favor of ostensibly crazy measures.

And there (Eureka!) we have the reason why, in a case like *Cusack*, a patent small-numbers objection to the economic rationality of the decentralization scheme must be disregarded as long as the scheme can be seen to have originated in a duly constituted legislative process in which there was the clearest of opportunities for log-rolling by or on behalf of a well-defined, "vested" interest (*i.e.*, the billboard industry) which stood to be directly harmed by the very enactment establishing the decentralization. The final result is that by use of normative economic thinking these four delegation cases can be reconciled, but only by a move that also overthrows a well-entrenched body of doctrine in the not-so-remote area of public purpose. No matter how one works this economic shell game, one cannot cover all the peas.

In a normative economic framework, then, it looks like good-bye to rational-basis review under the banner of public purpose—or, for that matter, of general welfare or due process or equal protection. Yet under those banners state judges, at least, do continue to invalidate ordinances and statutes on grounds of substantive irrationality or like inadequacy, and judges state and federal continue to intone the rational-basis litany.¹⁰³ If it is true that even such restrained substantive judicial review is at odds with the subjectivist, individualist, normative economic account of the majoritarian welfare state, then that account cannot be said to have undisputed possession of the judicial imagination in the realm of public law adjudication. Some other conception also must be exerting influence there.

III. PUBLIC INTEREST THINKING IN PUBLIC LAW ADJUDICATION

Having considered some judicial applications of the public purpose and delegation doctrines in light of the public choice model, one ought now to consider these doctrines in light of the public interest model. Again beginning with the public purpose doctrine, the hypothesis now to be explored is that substantive judicial review under the *aegis* of public purpose, which impressionistically seems a far more common judicial stance than merely procedural review of legislative expenditure decisions, is consistent with an imputation to

¹⁰³See, *e.g.*, in addition to cases cited at nn. 53-55 *supra*, *United States Brewers' Ass'n v. State*, 220 N.W. 2d 544, 192 Neb. 328 (1974) (invalidating statutory protections for alcoholic beverage distributorships because "the exercise of the police power must be directed toward and have a rational relation to the best interests of society rather than the mere advantage of particular individuals"). See generally Note, *Counterrevolution in State Constitutional Law*, 15 STAN. L. REV. 309 (1963); Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. L. REV. 226 (1958).

judges of a public-interest type, but not a public-choice (economic) type, of normative model of government.¹⁰⁴ In a normative economic framework substantive review founders on subjectivism: the court confronts an unanalyzable, continuously emergent network of bargains—all of them presumptively rational in the eyes of those who actually make them—among kaleidoscopically shifting coalitions of self interest. But in a public-interest framework, in which measures are supposed to result from a joint legislative search for the right or best answer, nothing logically prevents a court from concluding that the legislature's search must just have gone off the tracks in a particular case.¹⁰⁵

Of course the judges would not have available any tightly structured logic or formula for deducing when a legislature has switched out of the ideal role. They would have to consult their own educated understanding of the values broadly shared in their society¹⁰⁶—including the rate and direction of evolution of values¹⁰⁷—in order to make judgments about whether given legislative products fairly reflect an effort to realize those values or their trajectories. Sometimes judges would, of necessity, be remitted to "hunches"¹⁰⁸—just as courts supposedly striving to make the common law efficient must sometimes fall back on hunches about such esoteric questions as that of how to adjust the legal relations of tulip gardeners and pea bird ranchers, when their activities are mutually interfering, so as to maximize the social value (in the economic sense of aggregated individual valuations) of the resultant product mix of tulips and pea birds.¹⁰⁹

¹⁰⁴But the exceedingly loose review in federal courts may reflect the influence of an economic model. See note 52 *supra*.

¹⁰⁵Indeed, the *positive* economic theory of legislation—as distinguished from the normative economic theory embedded in the public-choice model—predicts that humanly frail legislators will tend to stray from their ideal role, at least unless some external, discipline like substantive judicial review is imposed. See, e.g., G. STIGLER, *THE CITIZEN AND THE STATE*: 114-41 (1975); POSNER II, *supra* note 62; notes 228-30, *infra* & text accompanying.

Loose substantive review can be construed as both a recognition that legislators playing their ideal role re generally better situated than are judges for reasoning towards right solutions to social problems, and at the same time a device for prompting the legislators to act in that ideal role. Compare the role assigned to civil disobedience in RAWLS, *supra* note 102, at 364-68, 382-86.

¹⁰⁶No doubt closely consulting institutional history, as does Hercules in Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

¹⁰⁷See Tribe, *Structural Due Process*, 10 HARV. CIV. RTS. CIV. LIB. L. REV. 269, 291-303, 314-21 (1975).

¹⁰⁸Compare POSNER III, *supra* note 83, at 118.

¹⁰⁹See Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. LAW. & ECON. 201, 209-11 (1971). Compare *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 787-88, 104 N.W. 2d 227, 234 (1960) where, in the course of invalidating a statutory regulation of milk marketing practices, the court said: "Courts are not powerless to determine the character of . . . legislation. The construction of statutes and the determination of their reasonableness is the ultimate province, responsibility, and duty of the courts and must be exercised by them if state and federal guaranties of liberty and property rights are not to be made subservient to pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry and detrimental to another under the guise of police power regulations."

What happens if we try to use public-interest thinking to solve the puzzling batch of delegation cases?¹¹⁰ One conceivable approach is to differentiate the public-choice and public-interest models with respect to what role they assign to the legislature in the recognition, creation, and protection of *rights*. In the economically inspired public-choice model, the legislative process is seen as designed to reveal what legal rights it would be expedient to create for various classes of people.¹¹¹ In a public-interest conception, by contrast, the legislature's job is that of discerning what rights various classes of people as a matter of fact have, irrespective of the legislature's actual success in accurately discerning them, and of providing suitable forms of protection for those rights.¹¹² *Cusack* (the Chicago billboard case) would then reflect judicial satisfaction that the city legislature did its job correctly by concluding and declaring that property owners in established residential neighborhoods have rights not to be intruded upon by "offensive" structures like billboards, at the same time recognizing that there is no objection to letting people waive their rights; while in *Eubank* (the Richmond building-line case) the city legislature could be said to have failed in its responsibility to decide whether owners along a block have rights not to be disturbed by their neighbors' nonuniform setbacks or thin front yards, and in *Roberge* (the Seattle rest home case) the city legislature could be said either to have made no determination whether the residential owners have a right against entry of rest homes into their neighborhood or, if they did make such a determination, to have made it wrongly. This interpretation accounts for what earlier seemed to be surplus rhetoric in the *Roberge* opinion.¹¹³ It also fits well with the decision in *Euclid v. Ambler Realty Co.*,¹¹⁴ ten years after *Cusack* and two years before *Roberge*, in which the Court's validation of a city regulation excluding apartment houses from single-family residence areas rested heavily on the idea that apartments would be noxious intruders in such areas (like "pigs in parlors"),¹¹⁵ so that the city legislation could be seen as simply recognizing a

¹¹⁰See notes 68-71 *supra* text accompanying.

¹¹¹The economic problem is to devise that system of pre-exchange rights (legally enforceable claims) which will minimize the sum of (i) deadweight losses (misallocations) remaining after completion of all economically feasible exchange, and (ii) the costs of such exchange itself. For some elaboration, see Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Demsetz, *Some Aspects of Property Rights*, 9 J. L. & ECON. 61, 64-67 (1966); ECONOMIC ANALYSIS, *supra* note 2, at 36-38, 44-48. Some versions of the normative economic theory of government seem to proceed from a set of axiomatic, pre-political ("natural") rights—physical security of the person, for example, or property rights in the products of one's labor. But insofar as they do, they are hybrid theories—economic superstructures on noneconomic (objectivist) foundations.

¹¹²It will be noted that I am using "public interest" here to denote any conception in which the government's role is to identify and/or realize ends or values regarded as objective for the society—not just non-individualist ends or values like national power or cultural eminence; so there is nothing odd about describing the legislature's job in such a conception as that of identifying and protecting the objective rights of individuals.

¹¹³See note 71 *supra* & text accompanying.

¹¹⁴Note 92 *supra*.

¹¹⁵272 U.S. at 388.

true right of the residential owners already implicit in the ancient common law doctrine of nuisance. The account can even handle the 1927 decision in *Gorieb v. Fox*,¹¹⁶ one year after *Euclid* and one before *Roberge*, upholding a city ordinance establishing building setback lines on a block-by-block basis, relying on *Euclid* and distinguishing *Eubank* by reference to the delegation feature of the latter case. In *Gorieb* the city legislature could be said to have done the job that no legislature did in *Eubank*, that of determining (correctly, the Court must have thought) that building on one's property too close to the street is a violation of the property rights of one's neighbors.

There are, however, serious problems with this true rights—false rights—no rights account of the cases. One is that it does not explain why the *Eubank* blockfront cannot itself be treated as legislature determining the existence of a sort of right apparently endorsed by the Court in *Gorieb*. Another is that it does not explain why the Richmond City Council's action in *Eubank* (or the Seattle Council's in *Roberge*) cannot be treated as analogous to the Chicago Council's in *Cusack*—that is, as a determination that people do have rights not to be disturbed by neighbors building too close to the street (or neighbors introducing rest homes into a residential neighborhood) but are free to waive those rights (in *Eubank*, by just never asserting them). A still more serious problem is that the Chicago ordinance was in fact not a device for allowing a property owner to waive his right not to have a billboard enter his neighborhood, but rather one for empowering *his neighbors* to waive his supposed right *against his will*,¹¹⁷ and it seems very odd to think of the Supreme Court in 1916 as recognizing a collective, but not an individual, right against intrusion by billboards.¹¹⁸

All in all, we can conclude that if public-interest thinking has some way of explaining the delegation cases, it must be a different and better way than the rights-focused approach. An important clue to a possible better way is provided by an important new chapter in the delegation saga, not yet discussed.

Two terms ago, in *Eastlake v. Forest City Enterprises*,¹¹⁹ the Supreme Court revisited the problem of the *Eubank*, *Cusack*, and *Roberge* cases in a slightly altered context. The voters of the city of Eastlake, Ohio, had amended their city charter, as authorized by the Ohio Constitution, to stipulate that any zoning changes agreed to by the City Council must be ratified by a 55%

¹¹⁶Note 79 *supra*.

¹¹⁷That is, a majority of the owners in the block could grant a waiver.

¹¹⁸It is true that the plaintiff in *Cusack* was a would-be sign builder, not a non-consenting neighbor, but that point seems insufficient to handle the objection. The restraint on the sign builder is supposed, in our tentative public-interest theory, to be justified by the fact (which the Council's ordinance is merely supposed to recognize) that his neighbors have rights against his building the sign. But the idea that the Council's ordinance means to recognize such rights is contradicted by its provision allowing entry of the sign with less than unanimous consent—thus undermining the supposed justification for restricting the sign builder's freedom in the first place.

¹¹⁹426 U.S. 668 (1976).

vote in a referendum before they could take effect. The plaintiff, a landowner who had obtained both Planning Commission and City Council approval for a zoning reclassification to permit construction of an apartment building but apparently lacked confidence in the outcome of a referendum, challenged the referendum requirement as a violation of due process rights. The Supreme Court of Ohio agreed, citing the *Eubank* case and calling the procedure an "unlawful delegation of legislative power."¹²⁰ The U.S. Supreme Court reversed.

The Court first denied that the referendum could properly be characterized as a legislative "delegation" at all, considering that state legislatures are supposed in the first place to derive *their* powers from the people, who can always—as had the people of Ohio in their constitution—reserve some of the law-making power to themselves (or to municipal electorates) by devices such as the referendum. But as the Court seemed to recognize,¹²¹ that analysis showed only that the Eastlake referendum procedure did not violate any procedural mandate of Ohio Constitution. It did not answer the general procedural due process complaint that the plaintiff's right to use his property had been left dependent upon (as the Ohio Supreme Court put it) "the potentially arbitrary and unreasonable whims of the voting public,"¹²²—which, of course, is just where *Eubank* comes in.

The Court answered the due process claim by observing that judicial relief would always be available if the voters' action could be shown to have been substantively unreasonable; by recalling that the requirement of "discernible standards" to control legislative delegations to administrative bodies had never been applied where power was reserved to "the people themselves;"¹²³ by noting that there is no better assurance that a representative legislature "will act by conscientiously applying consistent standards than there is with respect to voters;"¹²⁴ and—without yet having said anything which could distinguish *Eubank*—by simply concluding that there is nothing constitutionally objectionable about a standardless referendum procedure for making land-use decisions. *Eubank* was then, at last, distinguished on the ground that in that case the legislative body (presumably the Court was thinking of the Richmond City Council) had delegated its authority "to a narrow segment of the community not to the people at large."¹²⁵ "The standardless delegation of power to a *limited group* . . . condemned . . . in *Eubank*," said the Court, "is not to be equated with decisionmaking by *the people* through the referendum process."¹²⁶ *Roberge* was distinguished in the same way. Borrowing from

¹²⁰41 Ohio St. 2d 187, 198, 324 N.E.2d 740, 747 (1975).

¹²¹426 U.S. at 675.

¹²²41 Ohio St. 2d at 194, 324 N.E.2d at 746.

¹²³426 U.S. at 675.

¹²⁴*Id.* at 675-76 n. 10.

¹²⁵*Id.* at 677 (Court's emphasis).

¹²⁶*Id.* at 678 (emphasis supplied).

a Ninth Circuit opinion, the Court added the thought that "a referendum . . . is far more than an expression of ambiguously founded neighborhood preference. It is *the city itself* legislating through its voters—an exercise by the voters of their traditional right . . . to [determine] . . . what serves the *public interest*."¹²⁷ That last quotation, with its derogation of mere neighborhood "preference," in favor of something called a "public interest" found by something called "the city itself," should certainly suggest that the Court was not in direct touch with the divinities of economics and public choice while ruminating on the *Eastlake* case. And analysis will shortly confirm what the Court's rhetoric suggests.

The public-choice argument against the legitimacy of the popular-decision process in *Eubank* and *Roberge* applies with undiminished force to *Eastlake*. Just as the property owner in *Eubank* suffered a definite loss in a one-time-only, substantively and temporally restricted forum providing no scope for political compensation through vote trading (or even for build-up of moral obligation to be politically cashed in the future) so it was with the *Eastlake* plaintiff. Of course it is not literally true of the *Eastlake* electorate, as of the Richmond blockfront, that it will never again act as a body, or possibly even be in a position to do something nice for Forest City Enterprises, Inc. But you obviously cannot dicker with a citywide electorate for support now in exchange for your support on something else later; the coalition process does not work in the unwieldy and irregular referendum forum; one just wins or loses and that is all. The transactional assurance—the assurance from log-rolling—of broadly distributed long-run net benefits from public action is suspended equally in both the cases.¹²⁸ Nor will the public-choice analyst get any comfort from the Court's characterization of the *Eubank* blockfront as a "narrow segment" or "limited group," as contrasted with the wholesome inclusiveness of the *Eastlake* electorate. The *Eubank* blockfront was no narrower or more limited than the scope of the impact of the issue presented to it. Why else would "narrowness" of the decision group be a concern? In an economic, public-choice framework that query seems unanswerable.¹²⁹

A thesis of this essay, of course, is that the *Eastlake* decision exemplifies the salience in the judicial mentality of what I have called the public-interest,

¹²⁷*Id.*, quoting from *Southern Alameda Spanish Speaking Organization v. City of Union*, 424 F.2d 291, 294 (9th Cir. 1970) (emphasis supplied).

¹²⁸See Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 768-69 (1968) [hereinafter cited as Wolfinger & Greenstein].

¹²⁹A conceivable answer is that "narrowness" refers to an affected group's being so small (in absolute numbers) as to suggest that a voluntary, unanimous settlement could be achieved at tolerable transaction costs without any governmental intervention. See notes 76-78 *supra* & text accompanying. But our prior discussion suggests that a serious log-rolling defect should be sufficient, in the economic conception, to condemn a delegation even in the absence of a small-numbers objection. And in the sense relevant to the log-rolling dimension, the *Eastlake* electorate was a "narrow" forum, with a thin agenda.

as opposed to the economic or public-choice, model of legislation. For that thesis, a testing question is whether public-interest thinking can illuminate not only the *Eastlake* result but the *Eastlake* Court's treatment of *Eubank* (as well as *Roberge* and *Cusack*), as public-choice thinking cannot.

In addressing that question, it is necessary to refer to the discussion in Part I¹³⁰ of the idea that one can be an individualist in ethics—can, that is, take it as a premise that what ultimately counts in life is the experience of individuals—and yet maintain that an adequate conception of individual freedom depends on a view of at least some values as objective not subjective; and to the suggestion there that freedom for individuals depends upon the possibility of objective ends or values to which one can commit oneself on principle; that for individuals in secular society such ends or values will encompass matters of interpersonal relationship, obligation and respect and, for the freedom-seeking socialized individual, political process will be both a medium for reasoning towards ends (and acting towards their attainment) and, at the same time, itself one of the ends.

In such a public-interest conception (or community self-determination conception) of politics, there is nothing crucially objectionable about letting decisions be made by a process such as a referendum vote offering no opportunity for vote-trading, because the object of the process is supposed to be communal definition of aims. That point will suffice to explain the *Eastlake* result in terms of a public-interest model, but more is needed to explain the *Eastlake* opinion's treatment of *Eubank*. For if politics is a medium for joint definition of aims, why not also joint definition by the *Eubank* group of blockfront neighbors? One possible answer may come from Rousseau, beginning with his insistence that the definition of aims through politics is an ethical process,¹³¹ and one which treats the individual as the ultimate object of ethical concern.¹³² Such insistence means that when individuals act politically, when they act as citizens, they are to act on behalf of and with regard to one another, as well as themselves, as persons worthy of a full and equal measure of respect.¹³³ In Rousseau's no doubt romantic and arguably totalitarian vision, the requisite motivations of sympathy, respect, and responsibility were to be instilled in part through an elaborate education pro-

¹³⁰See notes 25-30 *supra* & text accompanying.

¹³¹See, e.g., J.-J. ROUSSEAU, *supra* note 24, at 15 ("act of association creates a moral and collective body"). See also CASSIRER, THE QUESTION OF JEAN-JACQUES ROUSSEAU, *supra* note 28, at 65-66; note 28 *supra*, *passim*.

¹³²See, e.g., J.-J. ROUSSEAU, *supra* note 24, at 13-14 (problem is "to find a form of association which will defend and protect . . . the person and goods of each associate"); *id.* at 15 (social compact provides for "receiv[ing] each member as an indivisible part of the whole") (emphasis in original).

¹³³See, e.g., *id.* at 10; *id.* at 29 ("undertakings which bind us to the social body are obligatory only because they are mutual"); *id.* at 30 ("every authentic act of the general will binds or favors all the citizens equally"). This is the condition on which the acts of a popular sovereign are truly acts of self-government and, accordingly, realizations of moral freedom. See Levine, *supra* note 20, at 39, 40, 43. See also note 138, *infra*.

gram.¹³⁴ But they would have to depend further on a strong and clear differentiation of the special role one plays *as citizen* from one's normal, everyday pursuits as private individual and, relatedly, on a careful construction of special formal or ceremonial contexts designed to place the individual in the special citizen's role—to force that role on the individual by cultural means—on those special occasions when political as distinguished from normally self-regarding private action is in progress.¹³⁵

An appreciation of this motivational importance of context and role could go far towards explaining what the Supreme Court might have meant by dismissing the *Eubank* blockfront as a "narrow segment" and a "limited group" to be distinguished from "the people" or "the city," and also what the Court could have meant in the *Carter Coal* case when it objected that the majority of coal producers and miners would not be acting "in an official capacity, presumptively disinterested"—all of it rhetoric which makes no sense in an economic, public-choice model of legislation.¹³⁶ The Court's true meaning, I suggest, is that when you ask an immediately interested person to cast a vote in a one-time blockfront decision about a building setback, or in a one-time industry decision about a labor code, you just cannot expect that person to switch into his or her special citizen's motivational mode of sympathy and responsibility for all equally. A strong enough signal has not been sent or a sufficiently powerful cultural constraint invoked to do such heavy motivational work. The Court thinks it is a different case, however, when a person is

¹³⁴See *id.* at 139-40 (discussing the "civil religion"). But my text fails to convey the subtlety and richness of Rousseau's views on education. See CASSIRER, *supra* note 28, at 120-27.

¹³⁵That Rousseau had no thought—and no wish—that the private sphere of life should disappear or dissolve into the "general will" is evident throughout *THE SOCIAL CONTRACT*. See LEVINE, *supra* note 20, at 57-58, 74-76, 196-97. For evidence of the significance he attached to formal or ceremonial context see, e.g., J.-J. ROUSSEAU, *supra* note 24, at 90, 92, 100, 103-04 ("apart from [his particular] good, [each man] wills the general good in his own interest Even in selling his vote for money, he does not extinguish in himself the general will, but only eludes it. The fault he commits is that of changing the state of the question, and answering something different from what he is asked. Instead of saying, by his vote, 'It is to the advantage of the State,' he says, 'It is of advantage to this or that man or party that this or that view should prevail.' Thus the law of public order in assemblies is not so much to maintain in them the general will as to secure that the question be always put to it, and the answer always given by it.") (emphasis supplied); *id.* at 106 ("when in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes.") (emphasis supplied). Chapter IV of Book IV of *THE SOCIAL CONTRACT*, *id.* at 110-21, describing forms of political organization and procedure in republican Rome, is evidently aimed in part at showing how such factors can be used to frame occasions for eliciting expressions of the general will rather than of particular wills. See especially *id.* at 119-20, discussing use of what we moderns call a roll-call vote. For a contemporary echo and a bit of empirical support for the claim that "an individual will respond differently depending on how the question is asked of him," insisting on "proper emphasis [on] the differentiation of institutions for putting the question—e.g., the market institution to elicit private oriented responses and political institutions for those which are commonly oriented," see Maass, *Benefit-Cost Analysis: Its Relevance to Public Investment Decision*, 80 Q.J. ECON. 216-17 (1966).

¹³⁶See notes 73-74, *supra* & text accompanying.

sent to the polls, in her capacity as a registered voter, to act on a matter before the whole city with which she, supposedly, continually identifies and which maintains a continuing salience in her consciousness of political life.

While it is worth suggesting that such a Rousseauian vision of politics may have played a part in the Court's decision and choice of rhetoric in the *Eastlake* case, it should not be suggested that Rousseau's argument, properly understood, can justify that decision. Certainly there is a serious question whether direct-democratic procedures can be expected to elicit authentic expressions of a general will when used sporadically in large and politically apathetic electorates.¹³⁷ Lacking any evidence on the point, it would be foolhardy to assume that contemporary *Eastlake* is a modern incarnation of eighteenth-century Geneva. Beyond that difficulty, Rousseau certainly would have objected that the form of the zoning-change question presented to the *Eastlake* electorate was far too particularistic, far too remote from any intelligible issue of general principle or general rule, to allow the members of the electorate responding to that question to be regarded as the sovereign people whose legislative utterances express a general will, or reflect the ideal of *self-government*.¹³⁸

¹³⁷See, e.g., Wolfinger & Greenstein *supra* note 128 at 767-68. Rousseau's own deep concerns about sustaining the citizenry's political morale are in evidence throughout *THE SOCIAL CONTRACT*.

¹³⁸Rousseau would have said that on this occasion the electorate was not legislating, but acting in the role which Rousseau variously styles that of the "prince," "executive," "magistrate," or "government." Compare the Ohio Supreme Court's somewhat surprising concession, in the *Eastlake* case below, that the zoning change presented a "legislative" (not an "administrative") question and therefore was subject to the Ohio constitution's referendum provisions. 41 Ohio St. 2d at 191, 324 N.E.2d at 743—. The court's position may have been that the issue was suitable for determination by referendum (*i.e.*, was "legislative") because the proposed development might have had significant city-wide ramifications. But in Rousseau's scheme, true legislation, expressive of the general will, is that which is "mutual; and [its] nature is such that in fulfilling [its obligations] we cannot work for others without working for ourselves." It must be cast in such a way that "there is not a man who does not think of 'each' as meaning him, and consider himself in voting for all The general will, to be really such, must be general in its object as well as its essence; . . . it must both come from all and apply to all; and . . . it loses its natural rectitude when it is directed to some particular and determinate object, because in such a case we are judging of something foreign to us, and have no true principle of equity to guide us." J.—J. ROUSSEAU, *supra* note 24, at 29. The same chord is struck time and again throughout *THE SOCIAL CONTRACT*, see, e.g., *id.* at 27, 30-31, 35, 36, 54.

This is of course not to say that all legitimate political acts must be legislative, must be acts of sovereignty, in Rousseau's sense of embodying general and mutual principles and rules. Obviously, the laws have to be applied to particular cases and there is thus a role for an executive and a judge. Nor is there any ultimate reason why the democracy itself may not play these roles in addition to that of sovereign legislator, see *id.* at 99, though Rousseau seems to have thought such arrangements risky and unwise: "It is not good for him who makes the laws to execute them, or for the body of the people to turn its attention away from a general standpoint and devote it to particular objects. Nothing is more dangerous than the influence of private interests in public affairs, and the abuse of the laws by the government is a less evil than the corruption of the legislator, which is the inevitable sequel to a particular standpoint." *Id.* at 65: "Were it possible for the sovereign, *as such*, to possess the executive power, right and fact would be so confounded that no one could tell what was law and what was not; and the body politic, thus disfigured, would soon fall a prey to the violence it was instituted to prevent." (emphasis supplied). See also *id.* 97. It follows that every conferral of executive or judicial authority must itself take the form

So while ascription to the Court of a Rousseauian public-interest conception of politics plainly comes closer than ascription of an economic, public-choice conception to explaining the opinion and decision in *Eastlake*, no more than a relative advantage can be claimed. A bit of reflection will show that the Rousseauian public-interest model also works at least as well as the economic model for *Carter Coal*, *Eubank*, *Roberge*, *Euclid*, and *Gorieb*.

But then what about the old nemesis, *Cusack*? It will be recalled that a previous discussion succeeded in giving an economic account of *Cusack*, but at the heavy price of knocking the public purpose doctrine out of the economically approved category.¹³⁹ Can Rousseauian public-interest theory do better? From the standpoint of a concern about ceremonial context, the Chicago scheme upheld in *Cusack*, no less than the Richmond one struck down in *Eubank*, left things to a "narrow segment" or "limited group" unlikely to be perceived by its members as a true civic forum rather than a battlefield or market.¹⁴⁰ Imputing to the Supreme Court a Rousseauian sort of community self-determination model of government would seem, then, to leave *Cusack* in an anomalous position. Certainly we cannot impute that sort of thinking to the Court that decided *Cusack*, but as for the contemporary Court—the Court that decided *Eastlake*—things look a bit brighter. For that Court dealt with *Cusack* in a cautious way that would leave intact any attribution to it of a Rousseauian vision. Whereas the *Eastlake* opinion seems to

of true (general) law, even—or especially—where such authority is to be exercised by the whole electorate. See, e.g., *id.* at 97-99.

Now in the case of the *Eastlake* zoning referendum there was no "law" in Rousseau's sense to govern the "executive" decision about whether to allow Forest City's zoning change—no general rule or principle, enacted in such a way as to impinge mutually on the interests of each citizen. Nor did the special charter provision for zoning referendums itself meet the standards of generality required for a true act of legislation. (We might note in passing how Rousseau's argument would condemn not only the *Eastlake* procedure but also that approved by the Supreme Court in *James v. Valtierra*, 402 U.S. 137 (1971).)

The problem of framing legislation so that it will have the kind of generality and mutuality of impact needed to satisfy the conditions of Rousseau's argument for the possibility of discovering a general will through voting, and at the same time will be sufficiently trenchant actually to control the decision of executive and judicial officials, is, obviously, a vexing one. It is known to modern American administrative law in the guise of "delegation" doctrine. See, e.g., *McGautha v. California*, 402 U.S. 182, 270 (1971) (opinion of Brennan, J.). I know of no demonstration that the problem has a solution. Certainly Rousseau offers no such demonstration. Compare LEVINE, *supra* note 20, at 48-49. What he offers, rather, is an argument that such a solution must be possible if political freedom—and, therefore, moral freedom—is to be possible in and through a democratic state.

¹³⁹See notes 99-103 & text accompanying.

¹⁴⁰From the standpoint of a concern about generality of legislation the Chicago scheme was actually worse than the Richmond one: In *Eubank* the neighbors in imposing the setback line at least had to impose it generally, on themselves as well as others, whereas in *Cusack* the releases were to be granted or withheld on a case-by-case basis. Thus the lack of standards created risks of favoritism and discrimination in *Cusack* not—at least not so obviously and directly—present in *Eubank*. The extent to which such risks were present in that situation would seem to have varied from block to block, depending on what proportion of a block's building lots were already developed, with what degree of uniformity in the setback distances of houses already built.

imply continuing approval of *Eubank* and *Roberge* even in the course of distinguishing them, the opinion's treatment of *Cusack* is both more subdued and more equivocal: *Eubank* and *Roberge* (which superficially seem opposed to the *Eastlake* result) are dealt with in the opinion's text, while *Cusack* (which superficially seems supportive of the *Eastlake* result) is relegated to a footnote—a footnote which non-committally relates that “since the property owners could simply waive an otherwise applicable legislative limitation, the Court in *Cusack* determined that the provision did not delegate legislative power at all.”¹⁴¹ Nothing is vouchsafed about the contemporary Court's appraisal of its predecessor's oft-questioned analysis.¹⁴² In short, probably the best thing that can be said about *Cusack* from the Rousseauian standpoint is that it is wrong. And the *Eastlake* Court is not saying differently.

IV. A COMPARISON OF THE DESCRIPTIVE POWER OF THE TWO MODELS

So far, by looking in detail at the explanatory value of two basic models of governmental legitimacy in relation to two judicial doctrines—public purpose and delegation—this essay has produced just a few bits of evidence in support of a sweeping claim which remains unproven: that in judicial treatment of public law problems, a noneconomic ideal conception of politics as a vehicle for community self-determination competes strongly with an economic ideal conception of politics as a vehicle for private self-maximization. Judges, the evidence suggests, go about their public-law work in the grip of these two opposed models. As a way of further exploring the content of the models and their oppositional relationship, and also of further investigating the clarifying potential of this two-models thesis, it may be useful to probe an area of law particularly related to local governments—zoning—by considering another puzzling pair of Supreme Court decisions—a recent pair, this time—which seem to have split on the question of the constitutionality of “single-family zoning.”

In *Belle Terre v. Boraas* (1974),¹⁴³ the Court upheld a zoning ordinance enacted by a very small village (it occupied about one square mile and included 220 homes inhabited by 700 persons), restricting the use of village land to dwellings for but one “family,” defined so as to exclude any

¹⁴¹426 U.S. at 677-78 n. 12.

¹⁴²See, e.g., Hogue, *supra* note 72; *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 675-80 (1975); HALE, *supra* note 78; McBain, *Law-Making By Property-Owners*, 36 POL. SCI. Q. 617 (1921). It is worth noting that the Court's opinion in *Belle Terre v. Boraas*, 416 U.S. 1, 6-7 (1974), had reiterated the *Roberge* Court's idea (see text following note 69, *supra*) that the *Cusack* ordinance was distinguishable from that in *Roberge* because the use regulated in *Cusack* was, as that in *Roberge* was not, a noxious one, likely “to work . . . injury, inconvenience or annoyance to the community, the district, or [some] person.” The Court's apparent retreat, in the *Eastlake* opinion, from that line of defense for *Cusack* seems consistent with the thesis advanced here. In a Rousseauian type of public-interest conception of politics, it would be repugnant to propose that *my* commercial billboard might be obnoxious in the neighborhood even though *yours* is not.

¹⁴³416 U.S. 1.

household group of more than two persons not all related to one another by blood, marriage, or adoption.¹⁴⁴ It was asserted by those attacking the ordinance that it trenched upon constitutionally protected interests in privacy and free association. The ordinance was, indeed, so designed that it would have the following effects: (i) it would deter unmarried couples from having children if they wished neither to leave Belle Terre nor to get married; (ii) it would bring pressure on unmarried couples to get married if they wished both to remain in Belle Terre and have children; (iii) it would require the removal from the village of couples willing neither to marry nor to remain childless; and (iv) it would completely bar from Belle Terre households composed of several unaffiliated adults. Thus the ordinance could very possibly constrain individuals in their choices regarding marital status, or family household composition, and certainly could penalize (or at any rate burden) individuals who refused to be so constrained. If those choices were constitutionally protected (under the rubrics of "association" or "privacy"), then, according to the prevailing canons of adjudication implicitly accepted by both sides, it would be incumbent on the village to justify its encroachment in this constitutionally protected zone by showing that the encroachment was "necessary" to satisfy some "compelling interest" of the state or village.¹⁴⁵

Justice Douglas, writing for the Supreme Court majority, concluded that no constitutionally protected interests in privacy or association were involved, that the ordinance was just an ordinary instance of "economic and social legislation where legislatures have historically drawn lines which we respect . . . if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective.'" ¹⁴⁶ No doubt there *were* permissible objectives in plain sight: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . ." ¹⁴⁷ But since, as Justice Marshall's dissent amply showed, these anticongestion goals might have been addressed more directly by regulations not intruding into household composition choices,¹⁴⁸ everything depended on the Court's surprising categorization of the Belle Terre ordinance as plain economic and social legislation, so that the village could justify it by showing it to have a mere tendency towards some permissible goal, without having to show public necessity or lack of less restrictive alternatives.

The Court's easy denial that constitutionally protected personal interests—civil liberties—were jeopardized by the Belle Terre ordinance *is* surprising. The plaintiffs' contrary claim¹⁴⁹ was at least respectable, demanding

¹⁴⁴*Id.* at 2.

¹⁴⁵See *id.* at 7-8; *id.* at 12-13 (Marshall, J., dissenting).

¹⁴⁶*Id.* at 8.

¹⁴⁷*Id.* at 9.

¹⁴⁸*Id.* at 12, 18-20. (Marshall, J., dissenting).

¹⁴⁹Although the plaintiffs' interest has occasionally been deprecated as a purely economic one in saving expenses by sharing living quarters, they asserted the civil-libertarian interest in

more serious refutation than the Court produced. There had been a number of prior decisions, invalidating state laws intruding on individual choice respecting such matters as marriage, divorce, intra-marital sex relations, procreation, child rearing, family planning, and education. Commentators had offered powerful suggestions about how to array and interpret those decisions as jointly reflecting a notion of constitutionally protected family privacy, rooted in an appreciation of the household grouping as a kind of protected zone within which values might be generated and nurtured—values that might provide the alternatives and suggest the new directions needed to prevent the solidification and stagnation of values that might otherwise occur in a monolithic society.¹⁵⁰ The Court itself has since signified agreement that the prior decisions were properly arrayed together in a “privacy” group, though it has not espoused any similar—or indeed any very informative—rationale for the privacy notion that has thus collected together a number of decisions which earlier had been seen as unrelated.¹⁵¹

Yet Justice Douglas’ opinion makes only a brief and evasive—almost, it seems, uncomprehending—response to the privacy and association claims: “The ordinance places no ban on . . . forms of association, for a [legal] ‘family’ may, so far as the ordinance is concerned, entertain whomever they like.”¹⁵² How is one to explain this apparent insensitivity to a fairly straightforward civil-liberties claim, on the part of this Justice who has never been thought to be either obtuse or an enemy to civil liberties—who has, indeed, been described as “the most ardent and explicit champion of lifestyle freedom yet to sit on the Court?”¹⁵³

Three years after upholding the Belle Terre ordinance, the Court again confronted a suburban single-family zoning restriction. This time, in *Moore v. East Cleveland*,¹⁵⁴ civil liberties prevailed and the ordinance was ruled invalid. East Cleveland’s somewhat unusual and complicated regulation could be roughly described as excluding not only nonfamilial household groupings, but also “extended” as distinguished from “nuclear” families.¹⁵⁵ One of its

their complaint (see Appendix on Appeal, *Belle Terre v. Boraas*, 416 U.S. 1 (1974), and that assertion was never found to have been disingenuous.

¹⁵⁰See Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765 (1973).

¹⁵¹Special constitutional protection for a category of autonomy-related interests collected under the rubric of “privacy”—including free choice regarding “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education”—has recently been confirmed by the Court. “In these areas,” says the Court, “it has been held that there are limitations on the State’s power to substantively regulate conduct.” *Whalen v. Roe*, 429 U.S. 589, 599-600 & n. 26 (1977), quoting from *Paul v. Davis*, 424 U.S. 693, 713 (1976); *Carey v. Population Services Int’l*, 97 S. Ct. 2011, 2016 (1977).

¹⁵²416 U.S. at 9.

¹⁵³Wilkinson & White, *Constitutional Protection for Personal Life-Styles*, 62 Cornell L. Rev. 563, 564 (1977) [hereinafter cited as Wilkinson & White].

¹⁵⁴431 U.S. 494 (1977).

¹⁵⁵*Id.* at 496 & n.2, 500, 504; *id.* at 508 (Brennan, J., concurring).

particular features was to distinguish among households containing a grandparent and more than one grandchild, admitting such households if all the grandchildren were one another's siblings but excluding them if any pair were first cousins. The appellant was an East Cleveland homeowner appealing from a criminal conviction and fine for having harbored two grandchildren, first cousins, in her home.

Writing for a plurality of four Justices,¹⁵⁶ Justice Powell relied on a civil-libertarian position similar to that which had been unavailing with the *Belle Terre* majority of which he had been a member—the position that, “[as] this Court has long recognized . . . freedom of personal choice in matters of marriage and family life is one of the liberties [particularly] protected by the Due Process Clause of the Fourteenth Amendment.” Because the East Cleveland ordinance “intrudes on choices concerning family living arrangements, [the] Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.” Examined from that standpoint, various anticongestion goals cited by East Cleveland could not justify its ordinance, because “the ordinance . . . serves them marginally at best.”¹⁵⁷ Of course, the same was true of the *Belle Terre* ordinance,¹⁵⁸ but it was distinguished as not encroaching on a “private realm of family life,”—evidently meaning by “family” not simply a domestic household group, but a group mutually linked by “blood, adoption, or marriage.”¹⁵⁹ The only reason offered in defense of this distinction was that “the Constitution protects the sanctity of the family because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”¹⁶⁰

Two *Belle Terre* dissenters who joined Justice Powell’s *East Cleveland* opinion also, through Justice Brennan, contributed some additional views of their own. Although they might consistently have dealt with the *Belle Terre* case by simply sticking to their earlier position that it was wrongly decided,¹⁶¹ they instead said that it was distinguishable because the *Belle Terre* ordinance did not, as the East Cleveland ordinance did, “inhibit [in any manner] the choice of *related* individuals to constitute a family, whether in the ‘nuclear’ or ‘extended’ form.”¹⁶² But they offered no account at all of the constitutional relevance of this distinction.

¹⁵⁶Including Justices Brennan, Marshall, and Blackmun.

¹⁵⁷431 U.S. at 500.

¹⁵⁸See note 148 *supra*, and text accompanying.

¹⁵⁹431 U.S. at 498.

¹⁶⁰*Id.* at 503-04.

¹⁶¹Justice Marshall had dissented on the merits, 416 U.S. 1, 12, while Justice Brennan had declined to reach the merits, *id.* at 10. Both Justices may have abandoned further resistance to *Belle Terre* in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 84 (dissenting opinion of Stewart, J., joined by Brennan, Marshall, and Blackmun, J.J.).

¹⁶²431 U.S. at 511 (Brennan J., concurring emphasis in original).

One more vote—that of Justice Stevens—was needed to swing the Court's five-to-four decision against the validity of the East Cleveland ordinance. In Justice Stevens' view, the constitutionally protected right infringed by that regulation was not a special right of self-determination in matters relating to family life, but a general property owners' "fundamental right"—"to decide who may reside on [one's] property," or, still more generally,—"to use [one's] own property as [one] sees fit," short of creating a "nuisance" that "impair[s] the enjoyment of other property in the vicinity" or violating a community land-use scheme having a "substantial relation to the public health, safety, morals or general welfare."¹⁶³ The challenged feature of the East Cleveland ordinance could not satisfy this "substantial relation to general welfare" test because the city could not possibly "explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins."¹⁶⁴ Apparently perceiving that families-only type ordinances—including Belle Terre's—would be generally vulnerable to like objection,¹⁶⁵ Justice Stevens expressed sympathy for a series of "well reasoned" state court decisions protecting the rights of "unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy."¹⁶⁶ Even so, he defended the Belle Terre decision (in a footnote) as "upholding a single-family ordinance as one primarily concerned with the prevention of transiency in a small, quiet suburban community."¹⁶⁷

All of the reasons advanced by the majority Justices for distinguishing between the East Cleveland and Belle Terre ordinances are deeply unsatisfying. The difficulty with Justice Stevens' "transiency" point is its stark nakedness. No explanation is offered either of why or how transiency might be regarded as an evil, or of why unaffiliated households might be thought more prone than "families" to be transient in whatever sense is supposed to be relevant.¹⁶⁸ The Belle Terre decision itself sheds no light on these questions, because it made no reference to any interest on the villagers' part in avoiding transiency, relying rather on their interests in avoiding congestion and in maintaining "family values"—interests on which Justice Stevens, evidently, though it inappropriate to rely.

¹⁶³*Id.* at 513, 520 (Stevens J., concurring).

¹⁶⁴*Id.* at 520.

¹⁶⁵Children would apparently not pose a special threat to public welfare just because their parents were not intermarried.

¹⁶⁶*Id.* at 516-17.

¹⁶⁷*Id.* at 519 n.15.

¹⁶⁸The plaintiffs in the *Belle Terre* case were, as the Court's opinion noted in passing, "students at [a] nearby State University" campus. 416 U.S. at 2-3. But the Court's reasoning in no way relied on this fact; nor did the opinion even advert to it again, unless we count the paragraph reading: "The regimes of boardinghouses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds." *Id.* at 9. Nowhere is there any mention or hint of a concern about transiency.

Justice Brennan's concurring opinion simply makes no attempt to defend the plurality's distinction between "families" and household groupings of unrelated persons, accepting the former but rejecting the latter as bearers of constitutionally protected interests in domestic self-determination. So Justice Powell's opinion for the plurality must bear the entire burden of that defense. Now doubtless there are policy arguments for trying to preserve the strength of traditional family forms in society,¹⁶⁹ and doubtless these are strong enough that a finding of constitutional impediment to certain governmental efforts in that direction¹⁷⁰ is not "lightly" to be made.¹⁷¹ Doubtless, too, "the institution of the family is deeply rooted in this Nation's history and tradition."¹⁷² But from none of these premises does the conclusion follow that "the Constitution protects the sanctity of the family"¹⁷³ in the sense required by the joint results of the *Belle Terre* and *East Cleveland* cases—that is, validating governmental direct censorship of nontraditional ("unrelated") in favor of traditional ("related") household groupings in favor of traditional ("related") household groupings.¹⁷⁴ In fact Justice Powell's proposition that "the Constitution protects the sanctity of the family"¹⁷⁵ — in that or any other sense — is certainly false if taken as a literal report of anything the Constitution says. Such constitutional protection, if detectable at all, can only be an inference from the document viewed as a whole—as a presumably

¹⁶⁹"The nuclear, heterosexual family is charged with several of society's most essential functions. It has served as an important means of educating the young; it has often provided economic support and psychological comfort to family members; and it has operated as the unit upon which basic governmental policies in such matters as taxation, conscription, and inheritance have been based. Family life has been a central unifying experience throughout American society. Preserving the strength of this basic, organic unit is a central and legitimate end of the police power." Wilkinson & White, *supra* note 153, at 568-69.

¹⁷⁰An opposite result in the *Belle Terre* case, invalidating direct, regulatory proscription of unconventional household groupings, would leave open many possible avenues for a governmental policy of encouraging the formation and maintenance of conventional family units. The preceding footnote suggests some of them, but hardly exhausts the possibilities—some of which, however, seem foreclosed by such decisions as *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

¹⁷¹"Law is a vehicle by which democratic majorities reaffirm shared moral aspirations and summon society's allegiance to a common set of behavioral goals. Deploying the constitution to undermine conventional precepts of domestic morality is a step not lightly taken." Wilkinson & White, *supra* note 153, at 568.

¹⁷²431 U.S. at 503.

¹⁷³431 U.S. at 503.

¹⁷⁴Patriotic observance, to take just one example for comparison, has also been a traditional institution in our country from its beginnings, and it is one for the sustenance of which impressive policy arguments can be summoned and various nonregulatory means doubtless employed. But does the Court think it follows that village governments are free to enact bans against those who decline to partake of—or even those who actively but peaceably oppose—such observance? See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). It is interesting that precisely such a distinction between direct regulatory proscription and less coercive means of "influencing" or "encouraging" private decisions lies at the heart of Justice Powell's opinion for the Court in the extremely controversial case of *Maher v. Roe*, 97 S. Ct. 2376, 2383 (1977). See also *Califano v. Jobst*, 98 S. Ct. 95, 99-100 & n.11 (1977).

¹⁷⁵431 U.S. at 503.

coherent plan having underlying moral premises, themselves implicit but intelligible through a parsing of the constitutional plan's overall "structure and relationships."¹⁷⁶ And when we consider that a main pillar—if not a keystone—in that structure is the first amendment, an inference that governments are not only constitutionally bound to respect traditional household forms, but are also constitutionally authorized to censor nontraditional ones, becomes problematic to say the least.¹⁷⁷ The difficulty is only aggravated, not alleviated, when—in the light cast by the first amendment—one heeds Justice Powell's injunction to open "our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause,"¹⁷⁸ and reflects on his suggestion that a crucial reason is that "it is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."¹⁷⁹ While

¹⁷⁶See generally C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 2) 1974 DUKE L.J. 533-34 & n.20, discussing Bork, *Neutral Principles and Some First Amendment Problems* 47 IND. L.J. 1, 17-19 (1971). It is true, of course, that Justice Powell's plurality opinion purports to rest on the Fourteenth Amendment's guaranty of "liberty" against governmental deprivation without due process of law. But "liberty" is an exceedingly vague notion and the plurality's limiting idea of the "rational continuum," borrowed from the second Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 522, 543, (1961), seems to recur to a structuralist conception: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum . . . which recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." 431 U.S. at .

¹⁷⁷"[A]s with the first amendment, lifestyle protection may require defense of the most idiosyncratic among us in order to discourage, at the outer perimeter, the state's natural inclination to compel its citizens to think and behave in orthodox patterns." Wilkinson & White, *supra* note 153, at 613.

"Pierce struck down an Oregon law requiring all children to attend the State's public schools, holding that the Constitution 'excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.' . . . By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."

431 U.S. at (plurality opinion of Powell, J.). But why doesn't the same apply if we substitute "Belle Terre" for "East Cleveland" in that last sentence? "There will," after all, "always be some Americans who resist traditional conceptions of family life and regard the favored legal status of the nuclear family as economically oppressive and a source of indignity and affront." Wilkinson & White, *supra* note 153, at 68. Why is it that governments are free to "standardize" them?

¹⁷⁸431 U.S. at 501.

¹⁷⁹*Id.* at 503-04. Compare Wilkinson & White, *supra* note 153, at 623:

Arguably, the state has no legitimate interest in restricting living arrangements to a narrow ideal of domestication: to, for example, the middle class family of four safely cottaged in the suburbs. That model has been with us too briefly and is changing too quickly to be the real basis of the state's concern in this area. Rather, the state's proper concern derives from the basic functions performed by 'family' units in society from sexual fulfillment and reproduction, to education and rearing of the young, to

none of this quite proves that the *Belle Terre* decision is wrong,¹⁸⁰ it does, I believe, amply show that Justice Powell's defense of that decision in *East Cleveland* is inadequate and unconvincing as it stands. And so the stage is set for asking whether either—or both—of the two suggested judicial "models" of local-government legitimacy can point the way towards a more authentic and satisfying account of the joint results in the *Belle Terre* and *East Cleveland* cases than the Court's opinions reveal.

From the economically inspired, market-failure ("public choice") justification for governmental authority, one can derive a fairly persuasive defense for the *Belle Terre* ordinance. Environmental or atmospheric factors—including a factor best entitled "moral ambience"—might certainly count as a significant type of spillover or public good (bad).¹⁸¹ Prevalence of a uniformly "familistic" type of ambience in one's local community is a condition that any individual household might value highly, and in addition is a somewhat delicate condition easily subject to destruction by the presence of nonconforming households who would (granting the reciprocity of it all¹⁸²) thereby be impairing the welfare of others. Beyond the question of the ambience itself there is the related question of the local public budget: how heavily the community members shall tax themselves and how the proceeds shall be distributed among various possible objectives such as public protection, education, recreation. There is a good economic argument to the effect that the efficiency of a majoritarian fiscal regime is maximized when homogeneity of preferences among the citizenry is also maximized — essentially, that when preferences coincide, political externality costs and political transaction costs are both minimized, or, putting it another way, that as preferences increasingly coincide, the majoritarian process approaches closer to the Pareto-ideal condition of frictionless consensus or unanimity;¹⁸³ and, of course, regulatory screening of prospective entrants by a criterion of conformity to the established familistic norm can be construed as a device for assuring convergence of preferences on those typical for normal families.¹⁸⁴

economic support and emotional security . . . [These] vital purposes of the family . . . appear to require some fidelity and constancy of relationship.

Was the Court, perhaps, privy to some evidence that household groups without a marriage bond are peculiarly lacking in fidelity and constancy? Is there any such evidence?

¹⁸⁰See notes 181-189, 193-95, *infra* & text accompanying for arguments supporting the decision.

¹⁸¹It should so count in a normative *economic* conception of politics, even if not in an objectivist conception in which the fundamental aim is something like "equal concern and respect" for each person, rather than maximum realization of private preferences. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 275-78 (1977).

¹⁸²Granting, that is, that the effect of a regulation like *Belle Terre*'s is to impair the welfare of persons like the plaintiffs.

¹⁸³See, e.g., Hirsch, *The Efficiency of Restrictive Land Use Instruments*, 53 *LAND ECON.* 145, 151-52 (1977) [hereinafter cited as Hirsch]; McGuire, *Group Segregation and Optimal Jurisdictions*, 82 *J. POL. ECON.* 112 (1974); R. BISH & H. NOURSE, *URBAN ECONOMICS AND POLICY ANALYSIS* 129-31 (1975) [hereinafter cited as BISH & NOURSE]; BISH, *supra* note 45 at 46-53.

¹⁸⁴It is, indeed, a more efficient sorting device than other forms of "snob" zoning which have sometimes been recognized as conducive to the purpose, e.g., BISH & NOURSE, *supra* note 183. See

The economic defense of the Belle Terre ordinance is, however, incomplete, (or, conversely, proves too much) until note is taken of both the community's size and its position within a surrounding constellation of communities. With its capacity of at least 220 households, Belle Terre could fairly claim to be too large to achieve a uniform ambience, at feasible transactions cost, through voluntary consensual agreements embodied in restrictive covenants.¹⁸⁵ On the other hand, Belle Terre is plainly small enough (one square mile) to make implausible any claim that by its regulation it was monopolizing some relevant market (in local community ambiances or budget-packages), thereby impeding the achievement of efficiency in that market. In this light the Court's highlighting of Belle Terre's small size¹⁸⁶ is noteworthy, as is the fact, asserted by the village and never contradicted, that opportunities existed elsewhere in the relevant market area for indulgence in non-familistic living arrangements by those with non-familistic preferences.¹⁸⁷ The Belle Terre ordinance thus presents an analogue to the segregation-of-incompatible-uses rationale for certain kinds of use-zoning that some¹⁸⁸ but not all¹⁸⁹ economic analysts have found plausible. The Belle Terre regulation certainly externalizes some costs onto persons like the plaintiffs, for whom (presumably) no available alternative is quite as favorable as living, non-familistically, in Belle Terre; yet it may be reasonable to think that the scheme copes so effectively with other externalities which would arise in its absence as to be, on the whole, a positive contribution towards efficiency in the use of metropolitan land.

If, however, the economic model of legitimacy thus accounts for the *Belle Terre* decision, how can it also handle the opposite *East Cleveland* decision? The subjectivist-individualist attitude of economics apparently would foreclose any possibility of suggesting that non-familistic intrusions upon a familistic ambience are somehow a more real, a more valid, spillover than are "extended family" intrusions upon a "nuclear family" ambience.¹⁹⁰ If the Belle Terre ordinance is to be explained or rationalized as an economically prudent device for minimizing externalities (reflecting the present villagers' actual, private preferences as combined through majoritarian procedures), it is hard to see how a like rationalization can be denied to the *East Cleveland* ordinance. We may not be able to fathom a significant preference for a

Hirsh, *supra* note 183, at 152-53. A regulatory sorting device is not superfluous—one could not rely on private, voluntary choices to sort metropolitan populations into municipal groupings characterized by internally convergent, if externally divergent, preferences—because there are counter-incentives stemming from the property-tax system of local finance. *See id.* at 148, 151.

¹⁸⁵*See* note 77, *supra* & text accompanying.

¹⁸⁶By devoting the first two sentences of the opinion to this feature. 416 U.S. at 2.

¹⁸⁷*See* Appendix on Appeal, *Belle Terre v. Boraas*, 416 U.S. 1, A46-A47 (1974). Jurisdictional Statement in *id.*, at 57a-58a (unreported opinion of the trial court).

¹⁸⁸*See, e.g.*, Ohls, Weisberg & White, *The Effect of Zoning on Land Value*, 1 J. URB. ECON. 428, 440 (1974).

¹⁸⁹*See, e.g.*, B. SIEGAN, *LAND USE WITHOUT ZONING* (1972).

¹⁹⁰*See* note 31 *supra* & text accompanying.

"nuclear" as opposed to an "extended" family ambience, but those in East Cleveland, as the outcome of their majoritarian procedure presumptively shows, evidently have that preference notwithstanding its general mysteriousness. Of course, East Cleveland is many times bigger than Belle Terre.¹⁹¹ But not only does nothing in any of the majority Justices' opinions even hint at any significance in that fact; more important is the lack of anything to indicate that East Cleveland is so large (or otherwise so situated) as to render its regulatory scheme monopolistic or preclusive of opportunities for extended-family living for those who prefer it.¹⁹² The conclusion is clear: Imputation to the Justices of the economic model of legitimacy succeeds rather nicely in explaining *Belle Terre*, but at best indifferently in explaining *East Cleveland*.

How well can these decisions be explained by imputing a community-self-determination type of public-interest model of legitimacy? Certainly some of Justice Douglas' rhetoric in *Belle Terre* seems to reflect such a conception: "The police power," he said, "is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."¹⁹³ It is not hard to see how the conception would tend to justify the Belle Terre ordinance for surely the members of a small village population, much as those of a residential household, can easily be seen as a group having a vital interest in room to choose a community-defining (and thus a self-defining) set of values, or way of life, or moral ambience. The arguments in favor of endowing community-sized groups with such capacity look, indeed, very like those for creating and protecting a free-choice capacity for household groups.¹⁹⁴ So how can the plaintiffs' interest in determining their way of life be legally entitled to prevail over the villagers' quite parallel and equally weighty interest? The villagers (as a village group) wish to nurture traditional family values. The plaintiffs (as a household group) would nurture something else. Why should the plaintiffs prevail—at least as long as they can, without great loss or inconvenience, live nondisrup-

¹⁹¹According to the 1970 U.S. Census, the population of East Cleveland was 39,600.

¹⁹²See 431 U.S. at 550 (White, J., dissenting). In appraising the likelihood of such preclusion, it may be relevant that East Cleveland is a majority-black municipality. See 431 U.S. at 508-10 (Brennan, J., concurring). There may not be many—perhaps there are no—other Cleveland suburbs with both living conditions and demographic features reasonably matching East Cleveland's.

¹⁹³416 U.S. at 9 (emphasis supplied).

¹⁹⁴See note 150, *supra* & text accompanying. The possibility of such an explanation of the *Belle Terre* decision is recognized, but not—as it seems to me—taken seriously enough, by Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 24-25, 28 n.107 (1977). Raggi's objection to justifying the decision by appeal to "a competing associational interest . . . of the townspeople in living in and maintaining a certain lifestyle" (*id.* at 24) apparently is that such a justification would endorse an "absolute right of . . . a majority . . . to dictate the disposal of another's property." *Id.* at 25. But that observation, even if correct, only sharpens and dramatizes—it does not resolve—the dilemma posed by the case. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 977-79 (1978) [hereinafter cited as *TRIBE*], and the observation may not be correct. See notes 199-205, *infra* & text accompanying.

tively somewhere else? For a Justice entertaining any such idea, its most straightforward translation into the parlance of two-tier equal protection doctrine would have been to say that even though the plaintiffs do have constitutionally favored or fundamental interests at stake, the state also has a constitutionally favored or compelling justification for allowing the village population to work out and establish *its* choice. But to state the case that way requires explicit assertion and defense of the proposition that protected zones for community choice are, like protected zones for household choice, a part of a "constitution of liberty."¹⁹⁵ If the Justice were not quite ready to assert and defend that position—but at some level of awareness were drawn to it—he might temporize by some such device as forcing the Belle Terre ordinance into the unlikely mold of mere economic and social legislation.

This non-economic, community self-determination account of the *Belle Terre* decision bears an interesting comparison with the economic account proposed above.¹⁹⁶ While this account does not depend, as that one did, on Belle Terre's being large enough to sustain it, it does depend, as that one also did, on Belle Terre's being small enough to sustain it—or, more precisely, on Belle Terre's being a minor enough part of a larger complex of communities or potential communities. For if there were no place but Belle Terre to which the plaintiffs could feasibly repair to live nondisruptively according to their own lights, then given the lack of grounds for preferring the villagers' lights to those of the plaintiffs, the proper disposition would seem to be to make the villagers allow the plaintiffs some room in which to live their lives, despite the unfortunate, resulting partial impairment of the villagers' ability to live theirs.¹⁹⁷ It is only because the plaintiffs can reasonably be asked to live elsewhere that the villagers' already established way of life seems to entitle them to stand their ground.¹⁹⁸ Thus there is an anti-monopoly qualifier in both the economic and the community self-determination accounts of the Belle Terre ordinance's validity—a partial commonality which suggests the possibility that the two accounts may not be so antithetical, at bottom, as they may sometimes appear to be.

Now how well does the community self-determination account succeed in explaining the *East Cleveland* decision? Can one say that it works, in that the East Cleveland regulation embodies no intelligible effort at value definition (or formation, or reshaping), so there is no state interest in permitting that

¹⁹⁵See F. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960). Professor Hayek might not cheer this application of his neat locution, but I do not see how he could deny its fittingness.

¹⁹⁶See notes 174-82 *supra* & text accompanying.

¹⁹⁷See *TRIBE*, *supra* note 194, at 983. More precisely, this would be the proper disposition in a normative conception of government which was objectivist in the compound sense of (i) incorporating the view that joint definition of values at the community level is a critical dimension of personal freedom (see note 30, *supra* and text accompanying), and (ii) incorporating a belief that *that* view itself has an objective basis, in a moral theory rooted in reason and including some such axiom as the claim of each person to "equal respect and concern" (see note 181, *supra*).

¹⁹⁸See *TRIBE*, *supra* note 194 at 983.

regulation which can justify the infringement of the plaintiff's own interest in self-determination? The argument would be that there is no intelligible or recognizable value, or value system, or ideal social vision, or moral conception, that anyone could be trying to discover or realize by favoring nuclear over extended families—or, better, that there is no such intelligible value system or moral conception which one could thus be trying to realize without thereby violating a special constitutional injunction against invidiously race-related distinctions¹⁹⁹—so that the true purpose of the ordinance may be supposed to lie elsewhere. If no one could find the words through which even to begin an explanation, in terms anyone else could even begin to understand (unless by reference to invidious socio-cultural stereotyping), or what ideal form of life inspires the preference for nuclear over extended families; if no one could verbally evoke (even if only intuitively or suggestively) a cogent relationship between that preference and some more inclusive and comprehensible vision of life (unless a vision made coherent only by an invidious racial stereotype), then the ordinance is not a (constitutionally admissible) effort at community self-determination and must be regarded as if aimed at some mundane goal—such as minimizing public school costs—which cannot override the plaintiff's interest in self-determination.

It is not, as might be thought, an objection to this view that even though the outsider can find no intelligible moral point or direction in a preference for nuclear over extended families, the East Clevelanders might have grasped or intuited some such significance in it. A like objection was cited as a reason for doubting whether the *East Cleveland* decision could be defended in an economic conception which would, at the same time, justify the Belle Terre ordinance.²⁰⁰ But the objection there reflected the deep subjectivism of the economic standpoint, and it does not carry over to the objectivist standpoint from which community self-determination is a valued process. Economics insists (methodologically²⁰¹) on the essential privacy and arbitrariness—the a-rationality—of all values. But that proposition is denied by the Kantian (or Rousseauian) philosophy that underlies the notion of community self-determination as a condition of personal freedom.²⁰² In that philosophy it must be possible to reject formulations of ends (as well as selections of means) because they are unreasonable; and so it must likewise be possible to say, of this or that formulation, that no one could reasonably think it.²⁰³ Granted

¹⁹⁹See 431 U.S. 509-10 (Brennan, J., concurring), noting that extended-family living arrangements are "especially familiar among black families," and in that light deploring the "cultural myopia" and "depressing insensitivity" displayed by the East Cleveland ordinance (although forbearing from any attribution to the city government of a racially discriminatory motivation).

²⁰⁰See note 191 *supra* & text accompanying.

²⁰¹See note 31 *supra*.

²⁰²See note 30 *supra* and text accompanying.

²⁰³See M. HORKHEIMER, *ECLIPSE OF REASON* 3-57, 162-187, esp. at 43, 174 (paper ed. 1974) [hereinafter cited as HORKHEIMER]. *TRIBE*, *supra* note 194, at 989, seems to agree in principle with the position taken here but to doubt its proper application to the *East Cleveland* case.

there would be more than a touch of presumption in a judge's passing judgment on whether some asserted but ineffable end or value, known or identified only by its supposed connection with some preference for a specified social state such as families-only, or nuclear-families-only, is reasonable or intelligible as such. Presumptuousness of that sort seems to be endemic in the role of the judge,²⁰⁴ even (or especially) in the economic conception of that role.²⁰⁵ In the end, whether in the economic conception or the one here illustrated, the judge has to fall back on an educated sense of how people think, feel, or want.

The result of this discussion suggests that, as between the two proposed models of local-government legitimacy, imputation to the Supreme Court of a community self-determination model does the better job of explaining the Court's dispositions in the *Belle Terre* and *East Cleveland* cases taken together. Readers can review the arguments—possibly revise them—and come to their own conclusions.

V. THE INTELLECTUAL SITUATION IN PUBLIC LAW ADJUDICATION

No grand generalizations are warranted by the fragmentary evidence presented here. At most it may suggest that a community self-determination model of local-government legitimacy competes with an economically inspired public-choice model in the adjudication of "open"²⁰⁶ questions arising under the few public-law doctrines examined above. One cannot say, on this evidence, whether the competition described obtains over a significantly broader range of public-law questions or, if it does, whether these loose formulations of the models are the most trenchant or fruitful ones with which to attempt a description of any such broader opposition or irresolution (respecting political ideals) as may be playing a part in the adjudication of such questions. From some preliminary work it does seem that the two opposed models will prove clarifying—and may themselves be clarified—as they are applied to a number of other topics in the constitutional and other basic law of local government, including voting rights and the distribution of voting power;²⁰⁷ standards and rights regarding the incorporation of new local-government units;²⁰⁸ rights regarding the distribution of the costs and benefits

²⁰⁴Compare Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1776 & *passim* (1976) [hereinafter cited as Kennedy].

²⁰⁵See notes 108-09, *supra* & text accompanying.

²⁰⁶See notes 5, 6 *supra* & text accompanying.

²⁰⁷See, e.g., *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977); *Hill v. Stone*, 421 U.S. 289 (1975); *Salyer Land Co. v. Tulare Lake Basin Dist.*, 410 U.S. 719 (1973); *Abate v. Mundt*, 403 U.S. 182 (1971); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

²⁰⁸See, e.g., *State ex rel. Davis v. Town of Lake Placid*, 109 Fla. 419, 147 So. 468 (1933); F. MICHELMAN & T. SANDALOW, *MATERIALS ON GOVERNMENT IN URBAN AREAS* 612-21 (1970).

of governmental operations within a unit;²⁰⁹ rights regarding the distribution of fiscal burdens and capabilities across political units;²¹⁰ and rights regarding fiscally motivated barriers to resettlement across political units.²¹¹ But those puddings are still baking.

An eventual appraisal might be that one of the two opposed models dominates the other in the judicial treatment of open local government law questions taken as a whole, in the sense of explaining all or most of what the other can explain and much else besides. Or it might be that neither conception dominates, that the situation just seems irresolute. In that event inquiry perhaps might turn towards trying to classify instances in which one or the other model does seem dominant: can their respective domains be staked out by subject matter? by type or level of official agency whose acts are under review? by jurisdiction or level or reviewing court?²¹² by still some other dimensions? If so, what further inferences are possible regarding the role in law of these competing political images, or their role in contemporary intellectual life generally,²¹³ or their sociological or anthropological underpinnings?

A further possibility, which should not be overlooked, is that these two conceptions, which seem opposed and mutually contradictory at the level of abstraction naturally evoked by the legal doctrines and decisions examined have, may at a deeper level be aspects of a unified conception not now fully comprehended. This essay has enearthed a few clues to the possibility of such a deeper synthesis: the need for an antimonopoly qualifier on community self-determination;²¹⁴ the perception that the shared or objective values underlying or flowing from community self-determination may include—quite centrally or prominently—respect for individual autonomy and civil liberties;²¹⁵ and the converse perception that normative economic conceptions of government may be founded on notions of pre-political, objective rights.²¹⁶ Pushing this speculation a bit further, it may be what one sees are not outcroppings of some underlying synthesis, but rather signs of enduring, irresolvable con-

²⁰⁹*See, e.g.,* Myles Salt Co. v. Board of Commrs, 239 U.S. 478 (1916); Associated Home Builders v. City of Walnut Bay, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Teagen v. Borough of Bergenfield, 19 N.J. Super. 212, 290 A.2d 753 (1972); Sperry Rand Corp. v. Town of North Hempstead, 53 Misc. 2d 970, 280 N.Y.S.2d 600 (Sup. Ct. 1967).

²¹⁰*See, e.g.,* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); McLennan v. Aldredge, 223 Ga. 879, 159 S.E.2d 682 (1968).

²¹¹*See, e.g.,* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

²¹²As to the last possibility, *see* note 52 *supra*.

²¹³The work of Duncan Kennedy is addressing questions of this sort. *See* Kennedy, *supra* note 204; D. Kennedy, "The Rise and Fall of Classical Legal Thought 1850-1940" (various draft chapters of unpublished manuscript).

²¹⁴*See* note 197 *supra* & text accompanying. LEVINE, *supra* note 20, at 74-78.

²¹⁵*See* note 112 *supra* & text accompanying. Compare Horkheimer, *supra* note 203, at 175: ". . . [o]nly a definition of the objective goals of society that includes the purpose of the self-preservation of the subject, the respect for individual life, deserves to be called objective."

²¹⁶*See* note 111 *supra*.

tradition.²¹⁷ There may be no end to an iterative alternation between objectivist and subjectivist foundations for political morality—each objectivist premise seeming to rest on a still deeper subjectivist one, and vice-versa.²¹⁸ Those apparently objective, pre-political, natural rights, for example, may just be hypostatizations of estimates about what configuration of fundamental legal entitlements will best conduce to individual self-maximization, given what seem to be enduring, if contingent, traits of human nature.²¹⁹ And yet those estimates may, in their inspirations and available verbal justifications, border on objectivist ethics or categorical imperatives.

VI. ECONOMICS: THE KEY TO LAW?

In introducing this study, I said that its aim was to see whether adjudication in "open" areas of public law can be characterized, as common-law adjudication has been characterized, as reflecting a fairly consistent judicial striving to make the law correspond with an economic conception of what it ought to be. In slightly different terms, the question has been whether there seems to be an "implicit economic logic" in public law adjudication, paralleling that which has been discovered in private law adjudication.²²⁰ Looking only at the very limited evidence presented here, the answer to that question would seem to be in serious doubt.

Now suppose it turns out that further work confirms the suggestion of this study, that insofar as one can say there *is* an economic influence at work in public law adjudication, one must say, as well, that another and at least equally powerful contradictory influence is also at work there. What bearing, if any, would such a confirmed finding have on the validity of the descriptive or explanatory economic theory of the common law?

At least three possible objections can be anticipated to a suggestion that this descriptive hypothesis about public law has any bearing on the truth of the positive economic theory of the common law: One objection would insist on the difference between normative and positive theories; a second would insist on a crucial distinction, in the *positive* economic theory of law, between judicial and other governmental behavior; and a third would insist on a critical difference between the *normative* economic theories of private and public law in regard to their respective degrees of plausibility or of direct and intuitive appeal. Considering these objections briefly, it seems that the first objection is partly, but only partly valid—restricting but not wholly refuting

²¹⁷See Kennedy, *supra* note 204, at 1766-76.

²¹⁸Compare HORKHEIMER, *supra* note 203, at 175: "The two concepts [of subjective and objective reason] are interlaced, in the sense that the consequence of each not only dissolves the other but leads back to it."

²¹⁹For a striking example of such thinking, see ECONOMIC ANALYSIS, *supra* note 2, at 121 (suggesting subjectivist economic account of right not to be raped). Compare B. DEJOUVENEL, ON POWER 204 (1962).

²²⁰See note 2, *supra* & text accompanying.

the claim that this essay's hypothesis about public law adjudication would, if true, contradict the positive economic theory of common-law adjudication; and that the second objection is beside the point except as it contributes towards the restrictive force of the first. The few comments that can be offered here regarding the third objection will not suffice either to dispose of it or confirm it.

The first objection might be phrased this way: It has been shown above (granting *arguendo* that anything at all has been shown) that judicial resolutions of open public law issues do not conform regularly and closely to a normative or prescriptive economic theory about how government ideally ought to work. The author has, in effect, been taking the part of a normative public-choice theorist engaged in criticizing judicial doctrines and decisions. By contrast, the economic theory of the common law is a positive or descriptive, not a normative or prescriptive, theory. The theorists mean not to criticize or condemn such common law doctrines or decisions as are not efficient, but rather just to show that the great preponderance of these doctrines and decisions are, as it happens, efficient. So their works and this one are asking different questions and there is, therefore, no way the answers can contradict each other.

In order to see why this argument is partly, but only partly, right, we need to take a closer look at the literature on the explanatory or descriptive economic theory of the common law. That body of literature seems to be branching into two which can be labeled an "automatic" branch and an "intentional" branch. The automatic branch of the literature²²¹ notes with interest how the micro data of the common law—its countless doctrines, rules, decisions—can apparently all²²² be captured and rendered by a simple, parsimonious principle (which happens to be a normative principle)—that of efficiency. But what the automatic theorists are ultimately interested in is exploding this illusion of normative intention behind the common law. They seek to show how the common law would tend to become efficient by a mindless (automatic) process in which no one ever intended to make it efficient—in which no one had any intentions at all regarding the social attributes²²³ of law or anything else—in which no motivations are supposed except those of individuals in realizing their own, private ends.²²⁴ For the mo-

²²¹See Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

²²²"All" is hyperbolic. Some anomalies remain to be explained. POSNER I, *supra* note 1, at 765.

²²³Efficiency is, of course, a "social" attribute of *social* practices or institutions—*i.e.*, the attribute of conducing to the satisfaction of private, individual preferences. See POSNER II, *supra* note 62, at 350.

²²⁴The argument, briefly, is that rationally self-interested private agents will tend to relitigate inefficient rules and doctrines more frequently than efficient ones; so that if judges are assumed to be indifferent or oblivious to efficiency (and their decisions, then, are random with respect to efficiency), there will be a tendency over time for inefficient rules and doctrines to be weeded out and efficient ones to be stabilized.

ment, at least it must be conceded that nothing presented in this study affects the validity of the automatic branch of the positive economic theory of the common law.²²⁵ Indeed, it could well be that an effect of the study will be to strengthen the position of the automaticians in their dispute with the intentionalists.

In the intentional branch of the theory, the potent explanation of the common law's observed content takes the form of a thesis—itsself, to be sure, a purely descriptive one—about an intentional and normative fact: The common law is explained by reference to the judge's normative appreciation of, and intentional striving for, the good of efficiency as a social goal. It is possible that intentional theorists are not ultimately interested in claiming that the efficiency norm really exists within or motivates the judge, that they would ultimately be content with the purely pragmatic claim that the observed results of adjudication accord, on the whole, with those to be expected if such a fantasy were true. Still, the theory's express form—which may be the source of much of its charm—is that of ordering a huge collection of seemingly disrelated phenomena by reference to a supposed judicial preference (veiled, inarticulate, intuitive, semi-conscious) for efficiency. There can be no doubt, at any rate, of a considered reliance on intentionality in some of the literature: There are suggested explanations of why judges should be expected to try to make their doctrines and decisions efficient;²²⁶ and there is discussion seemingly aimed at defending the intentional version of the theory against total demolition by automaticism.²²⁷

It may now be apparent that I think my evidence tells against the intentional version of the descriptive economic theory of the common law. The challenge posed by that evidence looks simple and straight enough: If the judges are predominantly guided by an economic norm when engaged in formulating and applying common law doctrine, why less so when formulating and applying open public law doctrine? If, on the other hand, judges respond ambivalently at best to economic norms on the public law side, why not likewise on the common law side?

It must be made clear that economic analysts who claim that in common-law, private-law, adjudication judges intentionally converge on efficient solutions do not advance, nor are they logically constrained to advance, any similar claims about legislators (including constitutional framers) engaged in devising statutes or constitutions. Indeed, it is characteristic of economic in-

²²⁵The reason is that the automatic branch depends on an argument that rationally self-interested private agents must, in deciding whether to litigate in an effort to modify some existing rule or doctrine, use calculations which will lead to more frequent relitigation of inefficient than of efficient legal material. But in regard to public-law doctrines and rules, the relevant agents include public officials and collective entities; and as to them, the argument from rational self-interest to more frequent relitigation of inefficient material may not hold. (I have not yet tried to work out an answer to the question whether it holds or not.)

²²⁶See notes 229-30 *infra* & text accompanying.

²²⁷See ECONOMIC ANALYSIS, *supra* note 2, at 440.

terpretations of political life to make an antithetical claim about legislative behavior—that legislative action is, as it supposedly must be, sold to particular interests rather than intentionally dedicated to any such “neutral” criterion as efficiency.²²⁸ This same literature suggests at least the beginnings of a theoretical explanation for such a perceived difference between legislative and judicial behaviors, based partly on the institutionalized insulation of judges from the usual incentives of the marketplace (by life tenure, protection against reduction of emolument, etc.) and the consequent replacement of those by other incentives like peer approval or protecting judicial jurisdiction against legislative curtailment.²²⁹ Approval and jurisdiction, the theory suggests, will seem to the judges to be subject to maximization by carrying out the legislative intent where one is reasonably ascertainable and minimizing waste (isn't everyone against waste?)²³⁰ where one is not. This extended economic theory of official behavior of course cannot be impeached by showing that particular statutes or constitutional provisions are inefficient as they come from the hand of the *legislator or framer*. The question is whether it can be impeached by showing that *judges* follow some star other than efficiency when dealing with open constitutional or general public-law material for which an ascertainable, historical intention does not exist and a plausible, efficiency-oriented interpretation does exist. Well, why not? “Because,” a highly individualistic economist might say, “you can't prove anything interesting with evidence so utterly unsurprising and predictable. Surely it is utterly unsurprising that judges adjudicating public law questions do not treat them as problems in economics, given the extreme difficulty (not to say impossibility) of producing a credible economic justification for the modern state. Given that governmental authority has grown to a size and sweep which seem on their face a contradiction of strictly economic normative premises, given that individualistic economics cannot credibly justify the historical reality of our actual practice of government, how could one expect individualistic economic norms to account for the interstitial general law through which judges have policed the distribution of power within the governmental sphere or its exercise by particular organs?”

Conceding that those would be forceful questions, are they any less telling if directed against the claim that judges have historically done—and continue to do—a semi-conscious economic number on the common law? The point is that the very set of constitutional practices within which judicial authority

²²⁸See G. STIGLER, *THE CITIZEN AND THE STATE* ch. 8 (1975); *ECONOMIC ANALYSIS*, *supra* note 2, at 405-07.

²²⁹See *ECONOMIC ANALYSIS*, *supra* note 2, at 401, 404-405, 409-10, 415-17; Landes & Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975). See POSNER II, *supra* note 62, at 351. *But see* Hirsch, Book Review, 22 U.C.L.A. REV. 980, 986-87 (1975).

²³⁰See *ECONOMIC ANALYSIS*, *supra* note 2, at 181; *id.* at 22 (suggesting that people speaking of “injustice” usually mean “waste”).

arises—authority to adjudicate both public and private disputes—is one which seems (at least to strongly individualistic economists)²³¹ to belie the notion that efficiency is a salient and esteemed social value in the minds of the politically influential citizenry. That seems to cut the ground from under the suggestion that judges intentionally aiming to please either themselves, or the legislature, or the people at large, would most likely fall back on efficiency as a solvent for open doctrinal questions. Or, if the suggestion survives, it must do so with a more precise (and interesting) meaning than we earlier noticed in it: It seems that the judges' reference group, the folks whom the judges aim to please, must consist of some sort of elite who are capable of appreciating the goodness of efficiency even while the masses (or other elites) whose actions actually shape the country's political destiny apparently do not. No doubt there are sociological theories available to fill out that model rather nicely. Still, one is less sanguine about the availability of sociological theories which will explain why the reference group is believed by the judges to demand that only common-law, and not also open public-law, issues be resolved in the way efficiency calls for; and one cannot help doubting whether this elitist theory of judicial reference groups, whatever it turns out to be in detail, is what the intentional theorists have actually been contemplating.

If not, and if they do not wish to embrace it now, there is always open the possibility of denying that the welfare state constitution is anti-economic in spirit or effect. It has, in fact, already been shown how the Constitution is not logically inexplicable in terms of those same individualistic economic premises which the intentional theory supposes to have inspired the development of the common law.²³² Contrary to first appearances and the contentions of some (not all) economists, the state's competence can, with at least a semblance of plausibility, be understood as a "means reasonably (not perfectly) designed to promote" the several self-interests of individual citizens.²³³ Earlier, a sophisticated argument (embracing two somewhat related sub-arguments) was reviewed which reconciles the individualistic assumptions of positive economics with familiar political constitutions in a way such that efficiency-oriented common-law judging can be fitted into a coherent justification of contemporary political ideology and practice.²³⁴ Reconciliation by this route, however, comes only at a price: The intentional economic theory of private law would then imply (that is, positivistically predict) judicial adherence to the normative economic (public choice) model of the Constitution. Insofar as this essay's discussion of the public purpose

²³¹See, e.g., *ECONOMIC ANALYSIS*, *supra* note 2, chs. 11-13, 16, 19; POSNER II, *supra* note 62, at 336-40.

²³²See notes 31-48 *supra* & text accompanying.

²³³The quoted phrase was used by Professor Posner in his first edition of *ECONOMIC ANALYSIS OF LAW* to explain the economists' methodological assumption of rationally self-interested behavior. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 5 (1st ed. 1973). It does not appear in the second edition. I do not know why not.

²³⁴See notes 33-48 *supra* & text accompanying.

and delegation doctrines succeeds in falsifying this prediction from the intentional economic theory, it would also, to a like extent, falsify that theory.

If that price seems too high, the intentional economic theory can still try to maintain itself while rejecting both elitist sociology and the plausibility of normative public choice theory. Its claim then would be that judges on the private-law side try to make the law efficient—or, in other words, waste-minimizing—because they sense that minimizing waste is something everyone will intuitively like and applaud (or, at least, that assiduous and consistent waste minimization will produce long-run results that everyone will like); but that nothing analogous happens on the public-law side precisely because the normative (public-choice) economic theory of government is (as shaped to fit actual institutions) so weak and implausible (not to say fantastic) that judges have no sense that acting in accordance with it will win them any approval. The problem with that explanation would lie not so much in its rejecting, as fantastic, the normative economic theory of the Constitution (if and as applied to justify actual constitutional practices) as in its ready acceptance of the plausibility of thinking that formulating and applying the common law by the canon of efficiency will in fact work out (or will be popularly seen to work out) in a way that is advantageous for (almost) everyone in the long run. A full treatment of the problem requires a careful development and criticism of the (likely) precise meaning of “efficiency” as used in the positive economic theory of the common law, and that is a task for another essay.